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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-10

THE UNIVERSITY OF TENNESSEE, *et al.*,

Petitioners,

v.

RITA SANDERS GEIER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners, The University of Tennessee, its President, Edward J. Boling, the Board of Trustees of The University of Tennessee, the present members of the Board of Trustees and its Vice-Chairman, respectfully pray that a Writ of Certiorari issue to review the decision rendered in this cause on April 13, 1979, by the United States Court of Appeals for the Sixth Circuit. In that decision, the Court of Appeals affirmed a decision of the United States District Court for the Middle District of Tennessee ordering that The University of Tennessee at Nashville and Tennessee State University, two institutions of higher

education located in Nashville, Tennessee be merged into a single institution.

The Respondents in this matter fall into the following categories:

(a) Rita Sanders Geier, Patrick J. Gilpin, Ernest Terrell, Harold Sweatt and Phillip Sweatt, Individually and as Next Friend of Phillip Sweatt, were the original Plaintiffs who filed this action in the District Court and were Appellees in the Court of Appeals.

(b) The United States of America intervened as a Plaintiff subsequent to the filing of this suit and was an Appellee in the Court of Appeals.

(c) The Plaintiffs, Raymond Richardson, Jr. and Hughland Richardson, infants by their Parent and Next Friend Raymond Richardson; Stanford Strong, Jr., Godfrey Strong, and Jeff Strong, infants by their Parent and Next Friend Stanford Strong; Derrick Harris, infant, by his Guardian and Next Friend Mrs. Claudia Adams; Osmond Robinson, LaNell Robinson, Vanetta Robinson and Jared Robinson, infants, by their Parent and Next Friend James Robinson; Rutherford Overton, Roscoe Overton, Jr., and Marva Overton, infants, by their Parent and Next Friend Roscoe Overton; David L. Acey, II, and Carolyn M. Biven, infants, by their Parent and Next Friend Mrs. Yvonne B. Acey; Joseph C. Simmons, Bryan E. Simmons, Alexis Fay Simmons and Dara Kaye Simmons, infants, by their Parent and Next Friend Joseph S. Simmons; Darryl Buford, Gerald Buford, Rhonda Buford and Terryl Buford, infants, by their Parent and Next Friend Frank A. Buford; Fred Bell, John Bell and Phillip Bell, infants, by their Parent and Next Friend Rev. Ezekiel Bell; Alice Vanessa Coleman, infant, by her Parent and Next Friend Mrs. Juanita Coleman; Audrey Fletcher and Theodore R. Fletcher, infants, by their Parent and Next Friend Mrs. Beatrice Fletcher; Malissa Michelle Moore, infant, by her Parent and Next Friend Tyrant Moore; Kathryn L. J. Sanford; Desaree Bowers and Montrice Bowers, infants, by their Parent and Next Friend Mrs. Kathryn I. Bowers; Vasco A. Smith, III, infant by his Parents and Next Friends Vasco A. Smith, Jr., and Mrs. Maxine Smith; Angela Mapp, Tony Mapp, Alice Mapp and Ivanette Mapp, infants, by their Parent and Next Friend James R. Mapp; Carlmon Payne, Vincent Payne, Frank Payne and Pitt Payne, infants, by their Parent and Next Friend Mrs. Janice Payne; Cheryl Johnson and Carl E. Johnson, Jr., infants, by their Parent and Next Friend Carl E. Johnson, Sr.; Juvetia Adams and Yulunda Adams, infants, by their Parent and Next Friend Foster L. Adams; Rickie L. Pearson; Mary Ann Myles; Mrs. Barbara Drake; Donald Campbell; Sterlin Adams; Harold J. Smith; Mrs. Joan Elliott; Mrs. Sammye J. Wynn; Raymond Richardson; Robert Bozeman; Dwight Bonds; Roscoe Overton; Joseph S. Simmons; George A. Dowdy; Rev. Ezekiel Bell; Minerva J. Johnican; Stanford Strong; Robert Smith; Herman E. Jackson; Mrs. A. Leola Barton; Irvin L. Willis; Foster L. Adams; Mrs. Beatrice Fletcher; Mrs. Juanita Coleman; Mahlon Griffith; Mrs. Kathryn Bowers; Mrs. C. E. McGruder; Mrs. Claudia Adams; Warren N. Moore; James Robinson; Mrs. Yvonne B. Acey; Frank A. Buford; Tyrant Moore; Mrs. Janice Payne; Charles E. Johnson; Vasco A. Smith; Mrs. Maxine Smith; James R. Mapp; Rev. Alfred DeWayne Hill; Mrs. Mary Lee Seymour; Mrs. Verneidl Hines; Mrs. Clyde T. Bardwell; Mrs. Gwendolyn Kiles; Rev. Samuel B. Kiles; Walter Evans; Thomas J. Troope; Harold A. Cohn, were granted leave to intervene as Plaintiffs in the District Court and did intervene and were Appellees in the Court of Appeals.

(d) The Board of Regents, State University and Community College System of Tennessee, were Defendants in the District Court but were Appellees in the Court of Appeals and should be considered as Respondents in this matter.

(e) Honorable Ray Blanton, The Governor of the State of Tennessee, was a Defendant in this matter and an Appellee in the Court of Appeals. Honorable Lamar Alexander is now Governor.

OPINIONS AND ORDERS BELOW

The initial Opinion of the District Court in this matter is reported as *Sanders v. Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968) and is included in the separate Appendix filed herewith at 1a.

A subsequent Opinion of the District Court is reported as *Geier v. Dunn*, 337 F.Supp. 573 (M.D. Tenn. 1972) and is included in the Appendix at 13a.

In an Order, dated April 19, 1974, the District Court ordered that the University of Tennessee at Nashville terminate its graduate education program and further ordered that, in the future, such program be offered exclusively at Tennessee State University. That Order is included in the Appendix at 33a.

The Opinion of the District Court ordering the merger of Tennessee State University and The University of Tennessee at Nashville, from which an appeal was taken by these Petitioners to the United States Court of Appeals for the Sixth Circuit, is reported as *Geier v. Blanton*, 427 F.Supp. 644 (M.D. Tenn. 1977) and is included in the Appendix at 37a.

The Order of the District Court, directing that the Plan of Merger filed by the Respondent, Board of Regents, State University and Community College System, Tennessee, be implemented, from which Order an appeal was also taken by these Petitioners, is not reported but is included in the Appendix at 78a.

The Opinion of the United States Court of Appeals for the Sixth Circuit in Appeals Nos. 77-1622 and 77-1624, which are companion cases to the Appeals filed by these Petitioners, is not yet reported but is included in the Appendix at 83a.

The Opinion of the United States Court of Appeals for the Sixth Cirucit, rendered on April 13, 1979, affirming the District Court's action in ordering a merger of these two institutions, is not yet reported but is included in the Appendix at 102a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 13, 1979. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254 (1).

QUESTIONS PRESENTED

I.

Whether the mere continued existence of a numerical predominance of black students among the student body of Tennessee State University, an institution of higher education which exists within a freedom of choice system, is per se violative of the requirements of the United States Constitution?

II.

If the continued existence of a predominantly black institution of higher education, 19 years after the elimi-

nation of all racial criteria for admissions, does violate the requirements of the United States Constitution, what affirmative measures are appropriate for, or required of, higher education officials in eliminating racial predominance in a single institution within the context of an educational system in which students have a free choice with respect to the institution which they will attend; and, further, have the requirements of the Constitution been met in this case?

III.

Did the District Court and the Court of Appeals err in applying a different standard for "dismantling the dual system" to the Nashville area and The University of Tennessee, in particular, from that applied to the state-wide system of higher education?

IV.

Absent an express finding by the District Court that these Petitioners have been guilty of Constitutional violations in their establishment of and operation of The University of Tennessee at Nashville, and in the light of express findings to the contrary, does imposition of what the District Court itself termed the "radical" remedy of eliminating The University of Tennessee at Nashville as an existing institution violate the principles of *Milliken v. Bradley* (I and II) and other decisions of this Court regarding proper remedies?

V.

In view of all relevant circumstances, is the merger of The University of Tennessee at Nashville and Tennessee State University a proper remedy for the Constitutional violations found to exist by the Courts below?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following Constitutional provisions and statutes, the text of which is set forth in the separate Appendix filed with this Petition, are involved in this case:

(a) Fourteenth Amendment, United States Constitution;

(b) Tennessee Code Annotated §49-1209;

(c) Tennessee Code Annotated §49-3213;

(d) Tennessee Code Annotated §49-3236;

(e) Tennessee Code Annotated §49-3239;

(f) Tennessee Code Annotated §49-3352;

(g) Tennessee Code Annotated §49-4208;

STATEMENT OF THE CASE

This Petition seeks review of the decision of the United States Court of Appeals for the Sixth Circuit, rendered on April 13, 1979, affirming the decision of the United States District Court for the Middle District of Tennessee in ordering that The University of Tennessee at Nashville, an institution of higher education in Nashville, Tennessee, (hereinafter referred to as UTN), be merged into Tennessee State University, (hereinafter referred to as TSU), another institution in the same city, for the purpose of correcting a continued black predominance at the latter institution. UTN is an institution of limited role and scope which is engaged almost exclusively in providing educational opportunities for working adults at night. TSU, on the other hand, is a comprehensive institution of higher education offering a broad graduate and undergraduate curriculum, whose student body is drawn primarily from the traditional college age group

and which offers classes almost exclusively during daytime hours.

UTN is part of an entirely separate system of higher education from that to which TSU belongs. It is administered and operated by the Petitioners, the Board of Trustees of The University of Tennessee. The University of Tennessee system is established as a separate school system by State law. Tennessee Code Annotated Section 49-4208. UTN is the only institution in the Middle Tennessee area which is part of The University of Tennessee system.

TSU is administered by the Respondents, the Board of Regents, State University and Community College System, which, pursuant to State law, administers three other universities and several community colleges in the Middle Tennessee area as well as institutions of higher education in other parts of the State. Tennessee Code Annotated Sections 49-3236 and 49-3239.

This action was filed in 1968, at a time when the University of Tennessee was planning to expand its Nashville Center, later UTN, and, to that end, to construct a new physical plant in downtown Nashville. The jurisdiction of the District Court was invoked pursuant to 28 USC §§1331, 1343 and 42 USC §1981, et seq. At that time, the Plaintiffs sought injunctive relief against the construction of that facility on the ground that the expansion of the Nashville Center would impede the desegregation of TSU (then known as Tennessee A & I State University). Subsequently, the United States intervened, supporting the request for an injunction and asking that the State of Tennessee be required to formulate a plan for the desegregation of its system of higher education.

After an evidentiary hearing, the District Court, in its original decision in this case, while holding that the previously existing dual system of higher education, as primarily manifested by Tennessee A & I State University, had not been dismantled and requiring the formulation of a desegregation plan, further observed that the State institutions were pursuing open-door policies and had been for a number of years and held that State officials had not been guilty of "Constitutionally impermissible acts" either presently or in the recent past. The Court further held that the school administrators were apparently doing "what is in their individual powers to do to integrate their institutions" and that continued segregated enrollments were a problem "not of their making." *Sanders v. Ellington,* 288 F.Supp. 937, 940, 941, 942 (M.D. Tenn. 1968).

The injunctive relief being sought was denied because the Court held that it could not "find that the proposed construction and operation of the University of Tennessee at Nashville Center will necessarily perpetuate a dual system of higher education" but, instead, the Court opined that "this additional educational facility in the Nashville area may play a part in the furthering of a unitary system." *Id.* at 941. After reviewing its findings regarding the valid and necessary educational purposes for which the University of Tennessee at Nashville Center had been created and which it had served and the reasons why it was expanding, the Court, in summary, found that "in its expansion program for the Nashville Center, the University of Tennessee seeks only to provide a quality continuing education and public service center for Nashville and Middle Tennessee with overwhelming emphasis being placed upon the provision of educational

opportunity for employed persons of all races who must seek their education at night." *Id.*

In 1972, the Court rendered a further Opinion in this matter in which it first observed that there had been a rather dramatic 42.2% increase in the number of black students enrolled in public institutions of higher education within the State of Tennessee between the academic years of 1968-1969 and 1969-1970, and, accordingly, observed that "with the exception of the situation at Tennessee State, substantial progress was made on a state-wide scale in attracting members of the Negro race to the public institutions of higher education in Tennessee." *Geier v. Dunn,* 337 F.Supp. 573, 575 (M.D. Tenn. 1972). Accordingly, the Court held that the dual system of higher education was being dismantled on a state-wide basis at a Constitutionally permissible rate of speed but, nevertheless, found fault with the continued black predominance of TSU which, as of the date of that Opinion, was still 99.9% black. Based solely upon its finding that the increase in the number of black students attending formerly predominantly white institutions had not been met by a corresponding increase of white students at TSU, the District Court ordered that steps be taken to establish a "white presence" at that institution. *Geier v. Dunn, supra,* at 581.

Subsequently, in a 1974 Opinion, the District Court ordered that the graduate education program which had previously been offered at UTN be taught only at TSU in the future.

In September and October of 1976, the District Court held a further evidentiary hearing in this case. At that time, there had been a very marked improvement in the integration of faculty and staff at UTN, TSU and the

entire state-wide system of higher education. The fall 1975 enrollment figures for TSU, which were the latest available accurate figures, showed that its student body, which had been 99.9% black at the time of the 1972 hearing, was then only 85% black with a 12.2% white enrollment (504, 522).[1] The faculty at TSU, which had been 81% black in 1972, was 68.84% black as of fall 1975 (527). The evidence also demonstrated a steady increase in black enrollment at UTN, with that institution's 1976 enrollment figures showing that overall its student body was 14.52% black with the freshman class being 18.5% black, as contrasted to an overall black enrollment of 10.5% in fall 1974 (521, 1647-1648). The percentage of black faculty at UTN had increased from 4.3% in 1974 to 6.9% in 1976. The state-wide system of higher education had also experienced steadily increasing integration, although at a slower pace than that experienced in the Nashville area, with an increase in black enrollment from 4.6% in 1969 to 9.7% in 1975 (without TSU) and an increase in the percentage of black faculty from 1.1% to 3.1% during the same period of time.

Throughout the history of this litigation, the Petitioners and other higher education officials have periodically submitted to the Court plans and reports relative to the efforts being made in the University of Tennessee system and the Board of Regents system to achieve desegregation. On July 31, 1974, pursuant to a prior order of the Court, all of the State Defendants filed a long-range Plan for achieving additional desegregation of public higher education. This Plan was developed by

[1]The record citations set forth in the Statement of the Case portion of this Petition refer to the Appendix filed with the United States Court of Appeals for the Sixth Circuit.

an ad hoc committee appointed by the governing Boards of the two systems, which committee followed the advice of a panel of expert consultants regarding the formulation of this Plan.

The Plan actually filed with the Court specifically addressed the situation in Nashville, providing for the continuance of TSU's operation as a traditional, primarily daytime institution, serving college-age students enrolled on a full-time basis through a wide variety of academic program offerings with a view toward the evolution of that institution into a broader-based, racially integrated university. The Plan contemplated that UTN would continue as an evening school, with substantially narrower program offerings than those provided for TSU, which programs were to be designed primarily to serve working adults who are enrolled as part-time students taking evening classes. The Plan provided specific definitions for the role and scope of each institution, assigned certain exclusive programs to each institution and identified certain areas for the development of joint and cooperative educational activities between the two institutions with a view toward the continued operation of each institution so as to perform its own distinctive educational services in a non-duplicative manner.

In the Opinion which was issued after this hearing, the District Court made no findings that the Petitioners or, for that matter, any officials had been guilty of intentional acts of discrimination. Neither did the Court retract in any way its prior findings regarding the purposes for which UTN had been created and operated. While approving the progress in integration in the statewide system which, indisputably, had been less than that accomplished by UTN, the Court again placed its emphasis upon the continued existence of black predominance

at TSU. Although the functions of these two institutions are entirely different and they draw their students almost exclusively from different population groups (i.e. working adults vs. college age full-time students) the Court, without specifying any basis for such finding other than its hypothesis that, if UTN did not exist, TSU might set up an evening program of its own which would draw from the pool of working adults, found that "the existence and expansion of predominantly white UTN alongside the traditionally black TSU have fostered competition for white students and thus have impeded the dismantling of the dual system." *Geier v. Blanton*, 427 F.Supp. 644, 652 (M.D. Tenn. 1977). While criticizing the lack of success of certain joint and cooperative programs between these two institutions, the Court in no way found or even implied that these programs had not been instituted and carried out in good faith by the officials concerned. On the sole ground that TSU remained a predominantly black, though partially integrated, institution and that UTN was attracting students who might otherwise attend TSU in the event that that institution offered an attractive night-time program for working adults, the Court ordered that the two institutions be merged under the governance of the Board of Regents, State University and Community College System not later than July 1, 1980.

Subsequently, pursuant to an express directive contained in the Court's Judgment, the State Board of Regents filed a Plan for accomplishing the merger of these institutions, which Plan provided that the merger was to take place by July 1, 1979. The District Court declined to rule upon the merits of this Plan, holding a position that it lacked jurisdiction since an appeal had been taken, but nevertheless held that "the Plan

submitted by the Board was timely filed and provides for the merger of the institutions by July 1, 1980. Consequently, it does not violate the Judgment. Absent a stay the Plan should be put into effect." This Order is set out in the Appendix at 78a.

These Petitioners appealed to the United States Court of Appeals for the Sixth Circuit from the District Court's Order that the two institutions be merged and from the Order in which it directed that the Board of Regents' Plan for Merger should be implemented. The Tennessee Higher Education Commission also filed an appeal. In an Opinion written by Judge Lively, which was filed on April 13, 1979, the Court of Appeals affirmed the District Court's actions. Without specifically addressing the question of whether the present existence of an institution of higher education with a student body which is 85 percent black violates Constitutional requirements, the Court placed its emphasis upon the historical failure of State officials to eliminate the dual system of higher education which existed some 19 years previously when all racial criteria for admissions were eliminated. While the Court did not specify exactly what steps are appropriate for eliminating a dual system of higher education where students may freely choose what institution they will attend, it nevertheless concurred in the District Court's apparent finding that, while it is not the province of the Court to determine or specify what steps must be taken to remedy the dual system, whatever measures were necessary had not been taken. Thus, without ever passing upon the question of whether the mere existence of a predominantly black institution of higher education is a Constitutionally deficient situation, the Court held that the District Court did have power to eliminate this situation by ordering a merger

and, further, held that, because of the existence of *de jure* segregation in The University of Tennessee system prior to 1960, the imposition of a remedy against the separate University of Tennessee system was appropriate even though that system had no control over TSU, and its only supposed contribution to the existing black predominance at that institution arose from its own success in providing educational opportunities for working adults of all races at night. In his dissent, Judge Engel opined that the continuing black predominance at TSU is primarily the result of that institution's efforts to retain its identity as a black university and the free choice of black students to attend that institution. Accordingly, Judge Engel expressed the opinion that the majority was in error because the merger remedy was violative of the principles enunciated in ***Milliken v. Bradley***, 418 U.S. 717 (1974), inasmuch as the remedy went beyond the Constitutional wrong found to have been committed by The University of Tennessee and, further, because the remedy imposed would tend to strengthen rather than eliminate segregation in higher education in Tennessee.

It is to have this decision of the United States Court of Appeals for the Sixth Circuit reviewed that these Petitioners pray that the Writ of Certiorari be issued by this Court.

REASONS FOR GRANTING THE WRIT

The questions presented by this case are both substantial and unique. The Constitutional permissibility of the continued existence of a predominantly black institution of higher education and the question of the appropriate duties and respective roles of the Courts and higher education officials with respect to such institutions are matters of the utmost importance. Never before has a

Federal Court ordered the merger or consolidation of two separate and distinct institutions of higher education as a remedy to achieve desegregation in one of those institutions. Whether such action is proper is a question which must be answered definitively, not only because of the effect of the merger remedy upon the lives of the thousands of students, faculty and staff of the two institutions directly affected, but because of the continuing existence of numerous other predominantly black colleges and universities. Since predominantly black institutions of higher education are found in almost all of the "Southern" states, the issues involved in this case have a broad impact. In view of the flaws in the rationale utilized by the District Court and the Sixth Circuit and the irreconcilable conflict between the rationale underlying the decisions of those Courts and principles previously laid down by this Court, the precedent of this case should not be allowed to stand and provide a basis for future decisions on the vitally important issues which it involves.

Additionally, these Petitioners respectfully submit that, in addition to the substantial public importance of the issues involved in this case and the significant errors in the Court of Appeals' decision, the granting of the Writ of Certiorari in this case is appropriate as an exercise of this Court's supervisory authority over the lower Federal Courts inasmuch as, upon examination of the Opinion of the Court of Appeals in this matter, no reasoned conclusion may be drawn other than that that Court has once again declined to apply the teachings of this Court from prior decisions regarding school desegregation to a case brought before that Court. As in two cases recently argued before this Court, ***Dayton Board of Education, et al v. Brinkman, et al*** and ***Columbus Board of Education,***

et al v. Pennick, et al, the Sixth Circuit has clearly deviated from the principles of Constitutional law enunciated by this Court, and such deviation cannot be permitted to stand as the law of this case, particularly in view of its importance to the persons involved and its broad public importance.

I.

THE CONTINUED EXISTENCE OF A PREDOMINANTLY BLACK INSTITUTION OF HIGHER EDUCATION IS NOT UNCONSTITUTIONAL PER SE.

While it is respectfully submitted that the Court of Appeals failed to face this issue squarely, a consideration of the issues involved in this case makes it clear that the decisions below are incorrect unless it is true that the mere existence of a predominantly black institution of higher education within a freedom of choice system is violative of the requirements of the Fourteenth Amendment to the United States Constitution. In view of the District Court's prior findings regarding the non-discriminatory and efficacious motives and purposes behind the operation and expansion of The University of Tennessee at Nashville, the absence from this record of any finding of intentional discriminatory conduct on the part of the Petitioners, the substantial integration of the student body and faculty of UTN (which exceeded that of other State institutions found to be in compliance with Constitutional requirements), and the Court of Appeals' affirmance of the District Court's finding that the statewide system was in compliance with Constitutional requirements, the decisions below simply are not supportable unless the mere existence of a predominantly black institution is impermissible. Unless this proposition is accepted, there is no other basis in the record for the imposition of the merger remedy. It is respectfully sub-

mitted that the approach to this question taken by the Court of Appeals that the District Court acted not upon the mere existence of a predominantly black institution but because of the failure to eliminate such an institution begs the question. Obviously, if a particular situation does not violate the Constitution, state officials are under no obligation to remedy that situation. Thus, this threshold question must be squarely faced and dealt with in the light of controlling precedent and simple logic.

In repeated prior decisions, this Court has held that the simple fact of racial predominance in particular schools within a system is not prohibited by the Constitution. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24, 26 (1971); *Milliken v. Bradley*, 418 U.S. 717, 747, fn. 22 (1974); *Washington v. Davis*, 426 U.S. 229, 240 (1976). This Court has made it clear that a racially disproportionate impact is not sufficient to taint official conduct, but, instead, there must be proof of a racially discriminatory intent or purpose before a Constitutional violation may properly be found. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-2 (1977).

If racial predominance is not a sufficient basis for a finding of a Constitutional violation in the elementary or secondary school context, it necessarily follows that such a situation may not properly provide a basis for a Court's finding of a Constitutional violation in a system of higher education. While the District Court, in its 1972 Opinion, expressly recognized that the existence of freedom of choice is very relevant with respect to the remedy to be imposed upon a system of higher education, inasmuch as it would be improper for the State to instruct a college student regarding what institution he must attend, it is

respectfully submitted that both the District Court and the Court of Appeals failed to recognize that such freedom of choice is also relevant to the question of whether continued black predominance in one institution may properly be found to violate the Constitution. While the educational choices of an elementary or secondary school student are restricted by his or her place of residence and the school zoning policies and other policies adopted by school officials, a student in a system of higher education exercises a free and unfettered choice regarding the institution which he or she will attend. This freedom of choice has historically been an important value in American society, and it is a right with which both the Courts and school officials are and should be reluctant to tamper. In view of the existence of this freedom of choice and the recognized importance of each student's right to select an institution which in his view fits his own particular needs, it is difficult to understand in what meaningful sense Constitutional rights are violated when officials of higher education afford students such a right. In the elementary and secondary school cases the underlying rationale for finding a Constitutional violation is the denial of equal educational opportunities to affected students. Clearly this rationale is not applicable to higher education.

The observation which one is compelled to make upon reviewing the decisions of the lower Courts in this case is that the Courts' finding of a Constitutional violation arises out of a subjective disapproval of the manner in which certain black students within the State of Tennessee have chosen to exercise their freedom of choice. It is respectfully submitted that such an approach crosses the line between a Court's appropriate role of determining whether Constitutional violations exist and formu-

lating appropriate remedies to eliminate those violations and invades the province of both the State and its citizens by substituting the Court's views regarding what institutions particular students should attend for those of the students themselves. One cannot fail to take cognizance of the Orwellian implications of a Court's holding that a student's Constitutional rights have been violated because his educational choices are not those which the Court thinks that he should have made, and the resulting imposition by the Court of a remedy which not only radically alters an existing educational system to force the student to make the choice which the Court thinks he should make, but also restricts the student's choices in the Nashville area by eliminating a specialized institution which primarily provided educational opportunities for working adults in the evening and at night. The adoption of such an approach mandates this Court's review.

As recognized and conversantly discussed by a Three-Judge Court in an Opinion written by Honorable Frank Johnson, Jr. in *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. N.D. 1968), there is a fundamental difference in the means which may appropriately be employed by educational authorities in eliminating a previously existing dual system of higher education from those which are appropriate elsewhere, and, accordingly, the Court's analysis of whether the State has discharged its responsibilities with respect to institutions of higher education must necessarily be different from that applied to elementary and secondary school situations. That Court declined to enjoin the construction, in the City of Montgomery, Alabama, of a four-year degree-granting extension of Auburn University, which injunction was sought on the grounds that that institution would compete with the predominantly black Alabama State University located in the same city. While accepting that State authorities have an affirmative duty to dismantle a previously existing dual system of higher education, the Court held that, so long as an institution of higher education is not practicing discrimination and is dealing in good faith with respect to its admission of students and its hiring of faculty and staff, the duty to dismantle has been met. This Court affirmed that decision. 393 U.S. 400.

The reliance placed by the District Court and the Court of Appeals upon this Court's decision in *Green v. County Board of New Kent Co. Va.*, 391 U.S. 430 (1968), as standing for the proposition that utilization of a freedom of choice system in education will not satisfy Constitutional requirements is misplaced for two very fundamental reasons. As the Court in the *Alabama State Teachers Association* case recognized, a free choice is part of the essence of higher education and, further, a consideration of *Green* reveals that the so-called freedom of choice plan before the Court in that case was only a subterfuge. *See Keyes v. School District No. 1*, 413 U.S. 189, 221 (1973).

An additional factor in this case is that, as of the date of the Court of Appeals' Opinion, all racial criteria for admission to colleges and universities in the State of Tennessee had been eliminated for 19 years. In a prior Opinion, this Court aptly summarized the factual analysis to be applied to such a situation in the following language:

> The duty of both the District Court and of the Court of Appeals, in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine

> whether there was any action in the conduct of the business of the School Board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington v. Davis, supra.* . . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such Constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy. *Dayton Board of Education v. Brinkman*, 97 S.Ct. 2766, 2775 (1977).

There were no findings by the District Court of intentional discrimination by the Defendants with reference to TSU or of any incremental segregative effect arising out of any alleged violations. The decision below therefore does violence to the very carefully articulated rationale of *Dayton.*

II.

IF A CONSTITUTIONAL DUTY TO ELIMINATE BLACK PREDOMINANCE EXISTS, SUCH DUTY HAS BEEN DISCHARGED BY THESE PETITIONERS.

Even if one may assume, for the sake of argument, that a Constitutional violation was present in this case, one should then consider very carefully those measures which are appropriate for, or required of, officials of higher education in eliminating desegregation from institutions of higher education. As the District Court recognized in its 1972 Opinion, "no Court can 'order' a student to confine himself to one college or university instead of another, for, unlike the situation in a system of

elementary or secondary education, such persons are free to leave and go elsewhere as they wish. The lesson is that, when it comes to the disestablishment of a dual system of higher education, a Federal Court *cannot* do what it might do in the realm of lower and secondary education: what works in one system will not work in another." (The Court's Emphasis) *Geier v. Dunn,* 337 F. Supp. at 579. Absent an ability to order a student to attend one particular institution or another, State officials face a very difficult problem in eliminating segregation from higher education. Obviously, the sorts of simple solutions which might be applicable in certain elementary or secondary school situations are not appropriate with respect to higher education. If a simple solution were being sought, the State of Tennessee could have eliminated TSU long ago, made some other provisions for the physical facilities of that university and thereby immediately, by the stroke of a pen, eliminated the dual system by forcing those black students who were then attending TSU to find another institution. Obviously, such a solution, while simple and easy, would not be fair to the students, faculty, alumni, staff and other persons interested in TSU. Any sorts of policies which would require students to attend a particular institution or otherwise limit the educational opportunities which are available to both black and white students would also be unacceptable.

Failing obvious solutions and having received no specific guidelines from the Court regarding what steps might be appropriate to eliminate black predominance at Tennessee State University (the only Constitutional violation found to exist in the State system of higher education), the various State Defendants, including these Petitioners, have, over a period of some eleven

years, submitted various proposals and adopted various plans for increasing racial integration in the State system of higher education. As already set forth, the 1974 plan in this regard provided for a minimization of any competition between The University of Tennessee at Nashville and Tennessee State University and involved a voluntary limitation on the part of these Petitioners of the role and scope of The University of Tennessee at Nashville. While the Court disapproved the results produced by the State's plans, it has never found that these Petitioners or, for that matter, any State Defendants, were not in good faith regarding the submission of these plans or their total effort to eliminate segregation in higher education. It is respectfully submitted that, as set forth in the Statement of the Case portion of this Petition, the progress in integration, particularly during the years between the 1972 Opinion and the 1976 evidentiary hearing, was substantial in view of the clear desire of certain black students to attend Tennessee State University, which problem was expressly recognized by Judge Engel in his dissent.

It is further respectfully submitted that there is a basic internal inconsistency in the findings and opinion of the District Court. Throughout this proceeding, from the initial Opinion in 1968 down to the 1977 Opinion, the Court has consistently found that, with the exception of Tennessee State University, adequate progress was being made in the elimination of segregation from higher education in the State of Tennessee. The only Constitutional violation found to exist in the 1977 Opinion, or in any prior Opinion, was the continued black predominance at Tennessee State University. Despite the fact that the District Court found that the progress of racial integration at predominantly white institutions satisfied

Constitutional requirements and declined even to evaluate the policies and goals contained in the Long-Range Plan with respect to those institutions, *Geier v. Blanton* at 651, the Court nevertheless held that the situation with respect to Tennessee State University and The University of Tennessee at Nashville, each of which had a larger percentage of other race representation and a more rapid rate of increase in other race representation than the overall state-wide figures, constituted a violation of the requirements of the Constitution. No basis for this distinction is apparent from the Court's Opinion, and neither precedent nor logic supports the imposition of one standard with respect to the rate and level of integration to one area and another standard to another area. Even assuming for the sake of argument that a continued racially disproportionate enrollment at institutions of higher education is per se impermissible, there is no basis for the imposition of a more stringent standard for eliminating such racial disproportion to particular institutions from that applied to other institutions. As it did with respect to the question of whether black predominance is a per se violation of the Constitution, the Court of Appeals failed to address specifically whether it was proper to apply to the Nashville area a standard which was clearly different from that applied to institutions of higher education in other parts of the State of Tennessee.

III.

THE IMPOSITION OF A MERGER UPON THE UNIVERSITY OF TENNESSEE AT NASHVILLE AND TENNESSEE STATE UNIVERSITY IS NOT A PROPER REMEDY.

Even if it be conceded, for the sake of argument, that the Court was correct in finding a Constitutional violation, the remedy which it imposed was not reasonably related to the violation which it found to exist, nor was that remedy equitable in view of all of the circumstances. As reaffirmed by this Court in *Milliken v. Bradley*, 433 U.S. 267 (1977), those remedies which Federal Courts impose to eliminate segregation must be formulated on the basis of "equitable principles." In that decision, this Court summarized, from its prior decisions, three factors upon which Federal Courts must focus in applying these "equitable principles." In that Opinion this Court stated as follows:

> In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the Constitutional violation. *Swann v. Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 16, 91 S.Ct. at 1276. The remedy must therefore be related to 'the *condition* alleged to offend the Constitution. . .' *Milliken I, supra*, 418 U.S. at 738, 94 S.Ct. at 3124. Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'. *Id.* at 746, 94 S.Ct. at 3128. Third, the Federal Courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. In *Brown II* the Court squarely held that 'school authorities have the primary responsibility for elucidating, assessing, and solving these problems....' 349 U.S. at 299, 75 S.Ct. at 756 (The Court's Emphasis).

The remedy imposed by the District Court and affirmed by the Court of Appeals conforms to none of these three factors .

As already set forth, these Petitioners have no affiliation with, nor control over Tennessee State University. The University of Tennessee system and the Board of Regents system operate as entirely separate entities in accordance with Tennessee law. Tennessee Code Annotated §§ 49-3236, 49-3239, 49-4208. Accordingly, the Court's remedy is being imposed upon educational officials, a school system and the faculty and students of that system who not only have not been found to be guilty of any discriminatory conduct which contributed to the violation found to exist but, further, have had no means of correcting the situation which the Courts below have found to violate the Constitution. Inasmuch as the sole violation found by the Courts below is the existence of Tennessee State University as a predominantly black institution and the only part which these Petitioners have been found to play in that violation is that they have provided educational opportunities which both black and white students have found to be attractive and have taken advantage of, thereby having deprived Tennessee State University of an opportunity which it might or might not have exercised to create a comprehensive night program of its own, these Petitioners respectfully submit that the remedy imposed is neither equitable nor responsive to the violation found to exist. At most, all that the Petitioners can be found to have done is to compete for students, and such competition,

being the life blood of higher education, is certainly not a proper basis for a punitive remedy.

The teaching of *Milliken v. Bradley, supra*, is that a remedy which acts upon a separate school system which has not been found to be guilty of intentional discriminatory conduct against pupils, teachers or staff is impermissible. While the Court of Appeals sought to distinguish between the deference which should be afforded to the existence of separate local public school systems and that which should be given to separate systems of higher education, it is respectfully submitted that no sound basis for such a distinction exists. The creation of separate systems at any level of education represents a very fundamental policy decision by Governmental authorities which should not be ignored, particularly where no improper or discriminatory purpose underlies such decision. Further, it is apparent from the Court of Appeals' decision that the principal basis on which it found the remedy imposed to be appropriate was the existence of *de jure* segregation in the University of Tennessee system prior to 1960. It is submitted that any guilt attributable to these Petitioners arising out of this fact has been purged by their own progress in integrating the University of Tennessee system.

As recognized by Judge Engel in his dissent in the Court of Appeals, the remedy imposed is not responsive to the ill found to exist. A change in the attitudes of the black students choosing to attend Tennessee State University and its faculty and staff are the only means by which the black predominance at that institution may be meaningfully eradicated. Absent such a change, the only realistic expectation from the merger ordered by the Court is that a predominantly black day-time

institution will control a night school which reflects the racial proportions of the Nashville population, a situation which, in no meaningful sense, can be deemed to accomplish the goals sought by the Courts below.

Secondly, it is not possible to concede that the remedy adopted by the Courts below is designed to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." As previously set forth, it is difficult to understand who the "victims" of discriminatory conduct are in this context, nor does the remedy being imposed grant anyone the right which he or she does not already have. Thirdly, the remedy imposed is a fundamental violation of basic principles of Federalism and a profound infringement upon the rights of the Legislative and Executive branches of the Government of the State of Tennessee and The University of Tennessee as a public corporation to organize and carry out higher education programs so as best to serve the citizens of the State of Tennessee.

Inasmuch as the Legislature of the State of Tennessee has recognized the need for and provided funds for a separate and specialized institution to meet the needs of working adults of all races who must seek educational opportunities after their regular working hours, the function which the District Court itself found was that for which The University of Tennessee at Nashville was created, and the Petitioners, the Board of Trustees of The University of Tennessee have set up, organized and operated this institution successfully for many years, it is fundamental infringement upon the right of local authorities to organize their own system of higher education for a Court now to say that the further operation of this institution is improper.

Further, the imposition of this remedy upon a separate system of higher education is analogous to, and repugnant for the same reasons as the cross-district remedy condemned by this Court in *Milliken v. Bradley*, 418 U.S. 717 (1974), and the zoning requirements imposed on junior college students found to be inappropriate in *Lee v. Macon County Board of Education*, 453 F.2d 524 (5th Cir. 1971), 468 F.2d 956 (5th Cir. 1972).

The remedy adopted by the District Court and affirmed by the Court of Appeals is improper. What the Courts below have done is to destroy the rights of students, faculty and administrators of all races to attend or be employed at a specialized institution of higher education providing opportunities at night for educational advancement by working adults, even though the District Court, after its first hearing, found that the expansion of The University of Tennessee at Nashville was not violative of the Constitution and never found, throughout this litigation that, in the operation of The University of Tennessee at Nashville, these Petitioners were guilty of any Constitutional violations. It matters not that an evening program of education may continue to be offered by the merged institution. It will not be operated by The University of Tennessee, and there is no assurance that the evening program offered by the University of Tennessee, which has assembled and is operating a program specially designed to meet the needs and enhance the continuing education of persons of all races who must attend school at night at an institution specially designed to meet their educational needs, will be continued.

Since the District Court decided in 1968 that the proposed expansion of the University of Tennessee at Nashville would not result in Constitutional violations,

and since the University of Tennessee at Nashville has been permitted to continue to exist and serve the specialized needs of its student body during the long course of this litigation and has performed these functions without committing any discriminatory acts, basic principles of equity are violated by the Court's merger order eliminating The University of Tennessee at Nashville, solely on the basis that its continued existence and expansion "have fostered competition for white students and thus have impeded the dismantling of the dual system." *Geier v. Blanton, supra*. Such a result, rather than being in accordance with the equitable principles governing remedies imposed by a Federal court, runs directly contrary to such principles.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-10

THE UNIVERSITY OF TENNESSEE, *et al.*,

Petitioners,

v.

RITA SANDERS GEIER, *et al.*,.

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 5077

RITA SANDERS; PATRICK J. GILPIN; ERNEST TERRELL; HAROLD SWEATT; and PHILLIP SWEATT, Individually and as Next Friend of Phillip Sweatt; Citizens and Residents of the State of Tennessee, and Citizens of the United States,

Plaintiffs,

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

BUFORD ELLINGTON, Governor of the State of Tennessee and Chairman of the Board of Trustees of the University of Tennessee; HOWARD WARF, Commissioner of Education of The State of Tennessee State Board of Education; TENNESSEE STATE BOARD OF EDUCATION, a State Agency; TENNESSEE HIGHER EDUCATION COMMISSION, and its Chairman, JOHN R. LONG, JR.; THE UNIVERSITY OF TENNESSEE, and its President, ANDREW HOLT; BOARD OF TRUSTEES of the University of Tennessee, and its Vice Chairman, WASSELL RANDOLPH; TENNESSEE A & I STATE UNIVERSITY, and its President, WALTER DAVIS, and its President-elect, ANDREW P. TORRENCE; INTERIM COMMITTEE for Tennessee A & I State University and the members of said Interim Committee, ARTHUR DANNER, WILLIAM JACKSON, and CRANVILLE SAWYER,

Defendants.

OPINION

The following is the text of opinion delivered from the Bench on August 21, 1968. Material in brackets has been added to the opinion as delivered.

This action was brought in an effort to prevent the University of Tennessee from constructing a new facility for expanding its program at the Nashville Center. The original plaintiffs are: a member of the faculty at Tennessee A & I State University; a member of the faculty of the University of Tennessee Nashville Center; a Negro student at Tennessee A & I State University; a Negro senior student at Wilson County High School; and the father of this high school student.

Although there has been no question raised by the parties either as to jurisdiction or as to whether this is a proper class action under Rule 23, Federal Rules of Civil Procedure, the court finds that it does have jurisdiction and it further finds that the action can be sustained as a class action.

The original defendants in the action were: the Governor of Tennessee, Chairman of the Board of Trustees the University of Tennessee; the Commissioner of Education for the State, Chairman of the Tennessee State Board of Education; the Tennessee State Board of Education itself; the Tennessee Higher Education Commission and its Chairman; the University of Tennessee and its President; the Board of Trustees of the University of Tennessee and its Vice-chairman; Tennessee A & I State Univesity and its then President, supplemented later by making as an additional party the newly-designated President of the University; the Interim Committee at the Tennessee A & I State University; the United States Department of Health, Education, and Welfare

and its chief executive officer; and the United States Office of Education and its chief executive officer.

By order previously entered the action was dismissed as to the federal defendants.

Subsequently the United States moved to intervene as a party plaintiff under the Civil Rights Act, 42 U.S.C. 2000(h)(2), and finding that the statutory requirements were met and that the motion was timely, the court granted the motion to intervene.

By its complaint in intervention the United States seeks not only an injunction to prevent the construction of the new facility, but also asks that this court order the State defendants to present a plan calculated to produce meaningful desegregation of the public universities of Tennessee.

In considering this case it is necessary, in my opinion, to put the present situation in perspective. The history of public educational opportunities for Negroes in Tennessee is not a pretty one. Prior to the Supreme Court decision in *Brown v. Board of Education* in 1954 [347 U.S. 483] the public educational system of Tennessee operated under one-half of the decision of the Supreme Court in *Plessy v. Ferguson* of 1896 [163 U.S. 537]. The races were certainly kept separate in the schools, but I would assume that no one would argue in good faith that the schools were equal.

The lone institution for so-called higher learning operated by the State of Tennessee for Negroes was the institution now designated as Tennessee Agricultural and Industrial State University. One of its chief functions was, according to the statutory history, the training of teachers.

Response to the decision of the Supreme Court in 1954 by the State was slow and reluctant. Although the blatant racism exhibited by some of the political leaders in states to the south of Tennessee was happily absent here, delay was the order of the day. The dockets of this court and the dockets of the courts in the other districts of Tennessee indicate that most of the progress which took place in the integration of the elementary and secondary schools of the State came as a result of court action. Insofar as its universities are concerned, some six years elapsed before racial requirements for admission were formally abolished.

The record does show, however, that now all institutions of higher learning are at this time pursuing an open-door policy.

Complaint is made here that the dual education system admittedly heretofore established by law in Tennessee has not been dismantled and, to support this allegation, figures have been introduced showing that the historically white institutions still have overwhelmingly white enrollments, and the Tennessee A & I State University still has an overwhelmingly Negro enrollment.

Figures introduced at this hearing indicate that some 57,000 students attend the State's public universities, of whom slightly over 6,000 are Negroes, or approximately 11 percent of the total.

In the individual traditionally white institutions the percentage of Negro enrollment ranges from six-tenths of one percent to a high of about 7 percent at Memphis State University. Incidentally, Memphis State University's percentage is not closely approached by any of the other schools.

On the other hand, Tennessee A & I State University continues substantially all Negro with a Negro enrollment in excess of 99 percent.

Based on the foregoing, the court finds that the dual system of education created originally by law has not been effectively dismantled. It appears, with the possible exception of Memphis State University, that progress toward desegregating these institutions in the eight years of the open-door policy has been slow. The reasons for this slow progress are, as I view the record, many and diverse.

I do not find, however, that the defendant Board of Trustees for the University of Tennessee or its administrative officials or the State Board of Education operating the other Tennessee public institutions of higher learning or its administrative officials are now or have been in the recent past, and I emphasize recent, guilty of any constitutionally impermissible acts in the administration of the institutions. Rather, it appears to the court clearly evident that the present situation is the result of mistakes and inequities in the past.

Dramatically portraying the results of past unequal educational opportunities is the material made a part of the record by Stipulation No. 19. It shows the results of tests administered by the American College Testing Program to the students who comprised the freshman student bodies in the fall of 1967 of the various state universities.

It shows that the mean score of the freshman classes at the historically white institutions range from 18.3 at Austin Peay State University to 22 at the University of Tennessee. On the other hand, it shows that at Tennessee

A & I State University the mean score was 11.9 and that 78 percent of that freshman class had scores of less than 16. Educators who testified here indicated, it seems fair to say, substantial agreement that 16 would be the minimum indication of ability to perform acceptably at the college level.

Since further information in this stipulation shows that the high school achievement records of these students, based on the average of their high school grades, varied very little, ranging from 2.49 to 2.73 on a 4-point basis, with A & I State at 2.59, it is clearly evident that the A & I students in the main came from high schools where the grading methods and scholastic standards were substantially different from the high schools from which the freshman classes at traditionally white schools were chiefly drawn.

It thus appears that the problems faced by the state universities in achieving desegregation of their student bodies are problems not of their making. The record does show that there is a rapidly accelerating trend in substantial portions of the State toward the elimination of what have been known in the past as Negro high schools. The results of this trend, however, were apparently not reflected in the freshman classes of 1967.

The University of Tennessee Nashville Center was established some twenty years ago to provide evening courses for employed persons who could not attend regularly scheduled classes at ordinary day institutions. The record indicated that the University made this step in Nashville at the request of Nashville citizens when other schools located in Nashville discontinued evening offerings. The Nashville Center remains primarily an evening program. The enrollment has steadily

grown and the number of course offerings has gradually increased to the point that students can now complete their requirements for a degree at the Nashville Center.

In addition to its evening program the Nashville Center operates the graduate school of social work for the University of Tennessee. At the request of Nashville Metropolitan Board of Hospitals, the Center has just begun to offer a two-year day program leading to the degree of Associate of Arts in Nursing.

From the record it appears that the University of Tennessee plans to construct a new building for the Nashville Center to provide more adequate space and facilities for the constantly growing programs mentioned above. In addition, the University seeks to provide for use of the new facility by other programs. The Government-Industry-Law Center of the University of Tennessee has planned to use the facilities of the new building for its Center for Training and Career Development. This program, which was begun in June of last year, is designed to provide continuous in-service training and career development for state and local government employees.

Further, the record indicates that the new facility is designed to provide space for statewide or regional conferences, seminars and workshops which are held in conjunction with the University's continuing education program.

Comparable programs at A & I consist of a nursing course and a limited evening program begun in recent years.

There is nothing in the record to indicate that the University of Tennessee has any intention to make the Nashville Center a degree-granting day institution. On

the contrary, the record clearly indicates and the court finds that, in its expansion program for the Nashville Center, the University of Tennessee seeks only to provide a quality continuing education and public service center for Nashville and Middle Tennessee with overwhelming emphasis being placed upon the provision of educational opportunity for employed persons of all races who must seek their education at night.

I do not find that the proposed construction and operation of the University of Tennessee Nashville Center will necessarily perpetuate a dual system of higher education. It may well be that, under the provisions of what I shall say later on in this opinion, this additional educational facility in the Nashville area may play a part in the furthering of a unitary system.

I specifically point out that, in reaching this decision that injunctive relief should be denied, I have not grounded it on the recent case of *Alabama State Teachers Association v. Alabama Public School and College Authority* [F. Supp. , Civil No. 2649-N (M.D. Ala., July 26, 1968)], involving the construction in Montgomery, Alabama, by Auburn University, a historically white institution, of a facility completely duplicating a historically Negro public college in that City.

Having said as I did earlier that many of the problems facing the responsible authorities in attempting desegregation of the public universities are not of their making does not mean that thereby they are relieved of the responsibility of achieving a desegregated system of higher education.

Upon consideration of the relevant precedents, particularly the decision of the Supreme Court in *Green v.*

County School Board of New Kent County [U.S. , 20 L. Ed. 2d 716 (1968)], and its companion cases, the court is convinced that there is an affirmative duty imposed upon the State by the Fourteenth Amendment to the Constitution of the United States to dismantle the dual system of higher education which presently exists in Tennessee.

The next question is whether the State is discharging this duty or has indicated that it has any plan to discharge this duty. In resolving this question the court has not attempted to fashion a comprehensive definition of what the duty requires. The court has, on the other hand, examined the record carefully in an attempt to determine what steps, if any, have been taken by the State of Tennessee through its higher educational institutions to disestablish the dual system.

From this examination the court has come to the conclusion that the University of Tennessee and the historically white institutions under the Tennessee Board of Education have made at least some good faith efforts to bring about desegregation of their institutions. I cannot say that I find any indication from the record, incomplete as it is, that the individual school administrators at these institutions are failing to do what is within their individual powers to do to desegregate their institutions.

Insofar as these historically white institutions are concerned, when everything is considered, including the geographic location of the various institutions, the quality of secondary schools surrounding them and the number of available Negro students who are qualified for admission, it appears that genuine progress is being made.

However, the court does not find it necessary to decide whether these efforts have fulfilled the duty of the individual institutions, because the fact remains that nothing has been done to dismantle effectively the dual system so graphically illustrated by the enrollment at Tennessee A & I State University.

Nothing has been shown in the record to indicate that any plan has been proposed, devised or considered to lead to the desegregation of that University except the naked fact of an open-door policy. The court is convinced that this policy alone does not discharge the affirmative duty imposed upon the State by the constitution where, under the policy, there is no genuine progress toward desegregation and no genuine prospect of progress.

Therefore, the court will enter an order requiring the defendants to submit to the court a plan designed to effect such desegregation of the higher educational institutions of Tennessee, with particular attention to Tennessee A & I State University, as to indicate the dismantling of the dual system now existing.

Since any major change of policy at one State university will necessarily affect the other State universities, including the University of Tennessee, and, since any sound plan would seem to the court to require cooperative efforts by all the higher educational institutions of the State as well as the Board of Education and the Tennessee Higher Education Commission, the burden of coming forward with such a plan will remain on all the defendants.

The court has been impressed by the fact that at long last the State legislature has taken a step toward the coordination of the efforts made by the State in

the field of higher education by the creation of the Tennessee Higher Education Commission, which is a defendant herein.

Now, in considering the time element for presentation of a plan, I have thought of the complexities of the problem. I recognize that the simple remedies which might be available to a county school board where there is involved a compulsory system of education, a free system of education, and assignment of students, are not available here. Colleges are not compulsory and everyone can testify that they're not free.

Any program must necessarily depend upon its success on whether it makes the institution attractive to students who will exercise a free choice as to where they attend college. For that reason, I'm giving a substantial amount of time for the submission of such a plan.

Before I state that, let me state that I have been concerned by a fact that clearly appears from the record, although it was not specifically commented on by any witness, that the failure to make A & I a viable, desegregated institution in the near future is going to lead to its continued deterioration as an institution of higher learning. I think everybody recognizes that. It is clearly apparent on the record that something must be done for that school and that the one thing that is absolutely essential is a substantial desegregation of that institution by whatever means can be devised by the best minds that the State of Tennessee can bring to it.

I will provide that the plan to be submitted shall be submitted on or before April 1, 1969.

I will ask counsel to prepare an appropriate order in which the two salient factors of this decision will be set forth; that is, the denial of relief insofar as the pre-

vention of the expansion of the University of Tennessee's program for its Nashville Center, and the provision for the submission of a plan.

/s/ Frank Gray, Jr.

UNITED STATES DISTRICT JUDGE

ATTEST: A TRUE COPY

Branden Lewis, Clerk
U. S. District Court
Middle District of Tennessee
By:

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 5077

RITA SANDERS GEIER; PATRICK J. GILPIN; ERNEST TERRELL; HAROLD SWEATT; and PHILIP SWEATT, Individually and as Next Friend of Philip Sweatt; Citizens and Residents of the State of Tennessee, and Citizens of the United States,

Plaintiffs,

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

WINFIELD DUNN, Governor of the State of Tennessee and Chairman of the Board of Trustees of the University of Tennessee; E. C. STIMBERT, Commissioner of Education of the State of Tennessee and Chairman of the Tennessee State Board of Education; TENNESSEE STATE BOARD OF EDUCATION, a State Agency; TENNESSEE HIGHER EDUCATION COMMISSION, and its Chairman, JOHN R. LONG, JR.; THE UNIVERSITY OF TENNESSEE, and its President EDWARD J. BOLING; BOARD OF TRUSTEES of the University of Tennessee, and its Vice Chairman, HERBERT S. WALTERS; TENNESSEE STATE UNIVERSITY, and its President, ANDREW P. TORRENCE; INTERIM COMMITTEE for Tennessee State University and the members of said Interim Committee, ARTHUR DANNER, WILLIAM JACKSON, and GRANVILLE SAWYER,

Defendants.

MEMORANDUM AND ORDER

Plaintiffs filed this action on May 21, 1968, to enjoin construction of the then-proposed Nashville Center of the University of Tennessee on the ground that it would, as an identifiably white institution, be duplicative of the courses and services offered at Tennessee State University[1] and would therefore tend to perpetuate that latter institution as an identifiably black school, hence preventing the effective disestablishment of the racially duel system of public higher education in Tennessee. On July 22, 1968, the United States intervened as a party-plaintiff, seeking both the injunction against the proposed construction referred to above and an order requiring the defendants to prepare and submit a plan calculated to produce meaningful desegration of the public institutions of higher education in Tennessee.

Following a hearing, this court found that "the dual system of education created originally by law [for the public colleges and universities of Tennessee] has not been effectively dismantled." *Sanders v. Ellington*, 288 F. Supp. 937, 940 (M.D. Tenn. 1968). The court then went on to hold that there is "an affirmative duty imposed upon the State by the Fourteenth Amendment to the Constitution of the United States to dismantle the dual system of higher education which presently exists in Tennessee." *Id.* at 942. Based upon its finding that there had been "no genuine progress toward desegregation and no genuine prospect of progress" (*id.*), this court entered an order refusing to enjoin the construction of the proposed Center, but requiring defendants to submit, by April 1, 1969, "a plan designed to

[1] At that time, Tennessee State was officially designated Tennessee A & I State University.

effect such desegration of the higher educational institutions of Tennessee, with particular attention to Tennessee A & I State University, as to indicate the dismantling of the dual system now existing." *Id.*

The plan which was submitted by defendants as a result of the aforesaid order placed heavy emphasis upon the individual efforts of the various institutions within the ambit of that order, mainly to increase minority group enrollment, and it stated that each such institution would "continue and expand efforts to recruit qualified Negro students"; would "intensify [its] efforts to recruit and retain Negro faculty"; and would implement pre-enrollment activities for minority group students who have academic deficiencies by virtue of past academic deprivations.[2] With particular regard to Tennessee State University, the plan stated that Tennessee State would intensify its efforts to recruit white students, intensify the efforts to recruit additional white faculty members, and "give concentrated attention to developing and publicizing academic programs which will attract white, as well as Negro students, from the Nashville area."[3]

The plan also stated that the public institutions of higher education in the Nashville area[4] would institute inter-institutional programs which would help achieve meaningful racial balance in enrollments.[5] The plan provided that these institutions would arrange for joint

[2] 1969 Plan, p. 3.

[3] 1969 Plan, pp. 5-6.

[4] The University of Tennessee-Nashville, Tennessee State, Austin Peay, and Middle Tennessee State.

[5] 1969 Plan, p. 6.

faculty appointments, would allow students complete transfer of course credits from one institution to another, and would avoid duplication of degree-granting curricula among these institutions.

Objections to this plan were filed by both the private plaintiffs and the plaintiff-intervenor, and after a hearing on depositions, this court, on December 23, 1969, entered an order stating that the plan—on the basis of the information then before the court—could be neither approved nor disapproved. The court noted the plan's lack of specificity and ordered the defendants to file, by April 1, 1970, "a report showing precisely what has been done on each individual item set forth in the plan. . . ." (Order entered December 23, 1969.) The court also reiterated its previously expressed conclusion "that the state does have a Constitutional duty to dismantle any state-supported dual system of education, at any level." *Id.*

The defendants filed their report on April 1, 1970. The report stated that the number of black students enrolled in public institutions of higher education in th state (exclusive of Tennessee State) increased 42.2 percent between the academic year 1968-1969 and the academic year 1969-1970. This represented an increase of from 2,720 students to 3,869, but it should be noted that this increase in black students attending predominantly white institutions occurred at the same time that Tennessee State was making no gain. Nevertheless, it is readily apparent that, with the exception of the situation at Tennessee State, substantial progress was made on a state-wide scale in attracting members of the Negro race to the public institutions of higher education in Tennessee.

The report revealed that, although the percentage of black students receiving financial aid decreased from 31.7 percent to 28.2 percent during the period covered, the actual dollar amount of financial aid utilized by black students increased from $507,000 in the academic year 1968-1969 to $775,000 in the academic year 1969-1970. This represented an increase of 53 percent, which is quite substantial.

The report showed somewhat more disappointing results, however, with regard to the success of the institutions in question (with the exception, of course, of Tennessee State) in attracting black faculty members. According to the report, the percentage of blacks among the faculties of these institutions increased from .4 percent in the academic year 1968-1969 to .9 percent in 1969-1970. The report stated that seven (7) members of the Tennessee State faculty taught on a part-time basis at the U.T.-Nashville Center in 1969-1970, while two (2) members of the engineering faculty of U.T.-Nashville taught, on the same basis, at Tennessee State.

Although the report revealed efforts to establish a joint engineering program between U.T.-Nashville and Tennessee State, no agreement had been reached on the matter as of the time the report was filed.

On June 3, 1970, the individual plaintiffs filed a "Motion for Further Relief." The ground for this motion was the individual plaintiffs' contention that the plan and report discussed above (of April 1, 1969, and April 1, 1970, respectively) did not "set forth a plan for the dismantling of the dual system of public higher education in the State of Tennessee, as ordered by this Court."

A hearing was set for June 14, 1971, on the individual plaintiffs' motion for further relief. However, on that

date defendants filed a "Desegregation Progress Report." Thus, in order to allow time for the court and the parties to consider and evaluate the new report, the date of the hearing was reset to June 15, 1971.

The June 14, 1971, report again emphasizes the efforts of each institution in question, on an individual basis, to increase the pace of desegregation. The only cooperative program to be revealed which appears to be of any significance is the recently-arranged joint engineering degree program between U.T.-Nashville and Tennessee State.[6] Even so, the report does not clearly indicate either the number of students and faculty that would be involved or the amount of time each participating individual would spend at the respective schools. Hence, the impact of this program upon the disestablishment of Tennessee's dual system of public higher education cannot be accurately evaluated.

With regard to the success of the efforts of the individual institutions in question, the 1971 report discloses varying results. Significant success in desegregation has been attained by Memphis State University and by the recently-established community colleges. The results attained by the other formerly all-white institutions were fair but less impressive, at least in terms of the *rate* at which desegregation is being accomplished. Further, none of the predominantly white institutions showed

[6]Middle Tennessee State, Tennessee State, and U.T.-Nashville have also agreed to offer a cooperative program leading toward the Specialist in Education Degree. However, this agreement merely permits, and does not require, students to take courses at each campus. On the other hand, the testimony revealed that there may be some duplication of programs, such as the nursing program, by U.T.-Nashville and Tennessee State.

any significant progress in faculty desegregation; in a majority of these institutions black professors constituted less than two percent of the total faculty. It is beyond question, however, that some good faith efforts have been made to attract black faculty members to these institutions and that such efforts have in large measure failed for the reason, simply stated, that more attractive employment opportunities are available elsewhere.

By way of contrast, the student body of Tennessee State is shown as 99.7 percent black during the academic year 1970-1971 and its faculty as 81 percent black during that period. Also of significance is the reported fact that the freshman class at Tennessee State for this year was 99.9 percent black.

It is thus clear that Tennessee State remains, in all practical respects, a black institution, while the institutions in close proximity to it, as well as some other institutions in other parts of the State, remain in large part white. And, while it is clear that the desegregation progress of the predominantly white institutions has been steady, the phenomenon of a black Tennessee State, so long as it exists, negates both the contention that defendants have dismantled the dual system of public higher education in Tennessee, as ordered by this court, and the contention that they are, in any realistic sense, on their way toward doing so. The problem before the court, then, is what must be done now? The answer is not simple, for, indeed, the law is not clear.

At first blush, the waters appear to have been muddied since the rendition of this court's original opinion in the case at bar, both with regard to the nature and scope of the duty imposed by the Constitution upon

the States concerning elimination of the vestiges of *de jure* segregation in public institutions of higher education and with regard to the actual power of the federal courts to require that that duty be performed. Two threshold questions, then, that must be given consideration in the present context are: (1) whether (frankly stated) this court erred in holding, in its original opinion in this case, that the defendants are under an affirmative duty actually "to dismantle" the dual system of education as it exists in Tennessee; and (2) whether, even if such duty exists, this court has the power to require anything other than a good faith "open door" policy in order to exact such duty. Accordingly, these two questions will be covered in the following discussion.

Ironically, the movement for racial equality in education had its beginning at the college and university level, and it was well established years before Brown I[7] that racial discrimination in public institutions of higher learning violates the fourteenth amendment. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). Moreover, the principles of *Brown I*, with regard to the invalidity of the "separate-but-equal" doctrine, were promptly extended into the area of higher education following that decision. *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956).

Notwithstanding the foregoing, defendants assert that a good faith open door policy satisfies the requirements of the fourteenth amendment. In support of this assertion, they rely upon the decision of the three-

[7] Brown v. Board of Education, 347 U.S. 483 (1954).

judge court rendered in the case of *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968) (hereinafter referred to as "*ASTA*"), and the fact that that decision was summarily affirmed, upon motion, by the Supreme Court of the United States, 393 U.S. 400 (1969).

The *ASTA* case was initiated to challenge the proposed construction in Montgomery, Alabama, of a branch of Auburn University. Already located in Montgomery was Alabama State College, a four-year institution originally established, and traditionally maintained, by the State for black students exclusively. The three-judge court refused to enjoin the proposed construction,[8] giving the following statement as the basis for its holding:

> "We conclude, therefore, that as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual system on the college level, to the extent that the system may be based upon racial considerations, is satisfied." *ASTA* 289 F. Supp. at 789, 790.

To determine whether the affirmance of *ASTA*, in the summary manner in which it was effected, did or did not constitute approval of the "conclusion" quoted above, it is necessary to analyze the case in some detail,

[8] It should be noted that, in ASTA, there was no request to require the defendants to develop and implement a comprehensive plan of dismantling the dual system of higher education throughout the State of Alabama, and there was no request that the court require affirmative action which would lead to the integrating of Alabama State College, other than the possible effect of the requested injunctive relief.

in the light of the effect upon the area of the law herein under consideration of a second three-judge court decision, apparently in direct conflict with *ASTA*, which also was summarily affirmed by the Supreme Court of the United States—namely, *Norris v. State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971) (Hoffman, J., dissenting), *aff'd. sub nom Board of Visitors of the College of William and Mary in Virginia,* U.S. , 30 L. Ed.2d 180 (1971) (memorandum).

In *Norris*, the relief granted was substantially similar to that which was denied in *ASTA*. The *Norris* plaintiffs sought to enjoin the escalation of a predominantly white junior college to a four-year college on the ground that such escalation would ". . . frustrate the efforts of its neighbor, predominantly black Virginia State College, to desegregate." *Norris* at 1369.[9] The defendants contended that the *ASTA* conclusions, as quoted above, was the "controlling law of the case." To this contention, the *Norris* court replied:

> "We cannot subscribe to the proposition that the Supreme Court represented in a one sentence memorandum decision that it approved every statement in the district court's opinion. The rule

[9]The Norris plaintiffs also sought the "ultimate merger" of the two institutions involved, and an order directing the Governor and the Council of Higher Education to prepare a plan for the desegregation of all state colleges and universities in the State. Finding no "present need" for the merger, the court denied this relief, without prejudice, stating that future developments at the institutions might alter the situation complained of. It also denied plaintiffs' request for an ordered plan for the desegregation of all state colleges and universities, but did so on procedural grounds "without comment on its merits," pointing out that all persons necessary for adjudication of this aspect of the case had not been joined as defendants.

> is appropriate for the result reached in *Alabama State Teachers Ass'n*, but removed from its context, it does not furnish a universal definition of a state's obligation to abolish a racially dual system of higher education." *Norris* at 1372.

And, upon this basis, the court went on to grant the injunction.

What, then, is the law which this court must follow in the instant case, given these two apparently diametrically opposed results, each of which was affirmed summarily by the Supreme Court? A further analysis of the *ASTA* opinion yields the answer to this question, and such analysis is here in order.

It should be noted at the outset that *ASTA* expressly recognizes the existence of "the affirmative duty to dismantle the dual school system on the college level." *ASTA* at 789. Clearly, then, *ASTA* does *not* stand for the proposition that a state is under *no* affirmative duty to dismantle a dual system of higher education in those cases where such a system is a vestige of *de jure* segregation. This court is thus of the opinion that *Norris* is correct in stating that, while "[t] he means of eliminating discrimination in public schools necessarily differ from its elimination in colleges,[10] . . . *the state's duty is as exacting*." *Norris* at 1373 (emphasis added).

With the foregoing points in mind, this court feels that the key to the *ASTA* result can be found in the following language:

> "Plaintiffs fail to take account of some significant differences between the elementary and secondary

[10]For reasons explored in more detail below. *Compare* ASTA, quoted *infra*.

public schools and institutions of higher education and of some related differences concerning the role the courts should play in dismantling the dual systems. Public elementary and secondary schools are traditionally free and compulsory. Prior to 'freedom of choice,' children were assigned to their respective schools. This could be done with equanimity because, in principle at least, one school for a given grade level is substantially similar to another in terms of goals, facilities, course offerings, teacher training and salaries, and so forth. In this context, although reluctant to intervene, when the Constitution and mandates from the higher courts demanded it, we felt that desegregation could be accomplished, and that the requirements of the law would be met, without our being involved in a wide range of purely educational policy decisions. Accordingly, we felt, in dealing with the problem of desegregating the elementary and secondary public schools, that we could and should review decisions concerning the impact of site selection for new construction or expansion without overreaching our area of competence.

"Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few. From where legislators sit, of course, the system must be viewed on a statewide basis. In deciding to open a new institution or build a branch or expand an existing institution, and in deciding where to locate it, the legislature must consider a very complicated pattern of demand for and availability of the above-listed variables, including, also, impact on the dual system. We conclude that

in reviewing such a decision to determine whether it maximized desegregation we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved." *ASTA* at 787, 788.

Several points are apparent in the foregoing quotation.

First. The *ASTA* court *was* consistent with the *Norris* line of reasoning, being concerned primarily with an injunction against the proposed construction of the Auburn branch. The court obviously felt that the decision to construct the Montgomery branch was a considered one on the part of Alabama educational officials, which, at least on the basis of the evidence before the court, *had* taken into account the "impact on the dual system" (*id.*) of such construction. The court thus apparently held the belief that to enjoin such construction would amount to nothing more than an almost presumptuous substitution of the court's judgment for that of the state officials involved, there being no good grounds for such substitution, on the basis of the record in that case. Thus, *ASTA* is distinguishable from the case at bar on the ground that the *ASTA* court merely refused to enjoin certain construction, on the basis of the facts before it. But this court feels that merely to note that *ASTA* is distinguishable from the case at bar, without analyzing it further, would be to ignore the real import of the *ASTA* decision.

Second. It is apparent in the foregoing quotation that the *ASTA* court carefully distinguishes between the situation regarding the integration of lower public educational facilities and the situation regarding integration of those of higher education. In the latter case,

the *ASTA* court points out, without clearly articulating the same, that a federal court necessarily cannot proceed, insofar as the framing of relief is concerned, in the same manner (and perhaps with the same abandon) as it could in the former case. Thus, regarding the disestablishment of a dual system of higher education, a court cannot—at least in the usual situation[11] —order the transfer of faculty from one institution to another, order the transfer of students from one institution to another, or actually set the curricula at various such institutions. Over and above the question of such a court's actual *power* to do so, such relief would not be administratively feasible, because there would be no way to ensure that it actually worked:[12] no court can "order" a student to confine himself to one college or university instead of another, for, unlike the situation in a system of elementary or secondary education, such persons are free to leave and go elsewhere as they wish. The lesson is that, when it comes to the disestablishment of a dual system of higher education, a federal court *cannot* do what it might do in the realm of lower and secondary education: what works in one system will not work i another. Yet this is so as a practical matter, and not as a result either of there being less of a duty owed by a state to dismantle a dual system of higher education or of a lack of power—at least in a jurisdictional sense—on the

[11] *But see* Lee v. Macon County Board of Education, 317 F. Supp. 103 (M.D. Ala. 1970), wherein a three-judge court, which included the author of ASTA, ordered, *per curiam*, some of the same sort of changes with regard to institutions of higher learning as are usually ordered in the context of integrating elementary and secondary schools, including a type of "busing."

[12] Which is a traditional requisite for a court of equity to take jurisdiction of a controversy.

part of a federal court to remedy such a situation. The limiting factor, from the court's point of view, is "What will work?"

Third (and in summary). It is apparent that the real concern of the *ASTA* court was with the problem of a balancing of the many interests and considerations that a court of equity traditionally must take into account before framing relief. Thus the *ASTA* court, in its opinion, performed as a traditional court of equity would perform, *without actually so stating*, and the usual equitable "balancing of interests" is what actually occurs in that opinion, without a clear enumeration of the interests involved.

It thus seems to follow that both *ASTA* and *Norris* are perfectly consistent with the approach recently taken by a unanimous Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), where the scope of a district court's equity power, in handling school desegregation cases generally, is precisely defined:

> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> ". . . [A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. *The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. . . . [and] [a]s with any equity case, the nature of the violation defines the scope of the remedy." Id.* at 15, 16 (emphasis added).

From a consideration of both *ASTA* and *Norris*, read in the light of the whole line of desegregation cases, culminating in *Swann*, this court is of the opinion that the present state of the law is as follows: (1) There is an affirmative duty on a state to dismantle its dual system of education, when such system is a vestige of *de jure* segregation; (2) "The means of eliminating discrimination in public schools necessarily differ from its elimination in college, but [(3)] the state's duty is as exacting" *Norris* at 1373; (4) a federal district court, in order to ensure that such duty is performed, is to proceed as a traditional court of equity; (5) accordingly, in framing relief, the court must balance the interests involved and take into account the administrative feasibility of the proposed relief, and, in fashioning the remedy, the scope of the relief must be fitted to the scope of the violation; and (6) in cases involving higher education, the interests of the state in setting its own educational policy are to be given especially great weight.[13]

Thus, in cases involving higher education, an open door policy, coupled with good faith recruiting efforts (as well, perhaps, as provision for remedial education for the educationally-underprivileged), is sufficient *as a basic requirement*: the great weight to be given the state's interest in making its own educational decisions compels this result, for, until it is apparent that such a policy is a failure, any more drastic remedy would constitute an untoward encroachment into the area of the state's interest.

But this "basic requirement" is not enough in those situations where it clearly fails to accomplish the ends

[13]This last proposition, this court feels, is the true teaching of the ASTA case.

sought. Surely, if there is an *affirmative duty* on the states *to dismantle* their dual systems, something more is required when the basic approach fails.

In such a case, the approach of the district court remains the same: it balances the various interests involved, takes into account the workability of the proposed relief, and measures the gravity of the situation to be remedied against all of these factors in deciding upon the gravity of the relief required. Thus, when the basic (and preferred) approach of an open door policy fails to be effective, the interest of the state in completely setting its own educational policy must give way to the interests of the public and the dictates of the Constitution.

Given the facts of the case at bar and applying the foregoing considerations to them, this court is of the opinion that, *with the exception of TSU*, defendants are proceeding to dismantle their dual system of higher education, taken as a state-wide whole, at a constitutionally-permissible rate of speed. Though their degree of success is in some respects disappointing, the fact remains that, again, except for the TSU phenomenon, the minority enrollment throughout Tennessee's schools and colleges is increasing on a regular basis year by year. Therefore, a continuance of present programs and policies would appear to satisfy constitutional requirements as to these schools.

With regard to Tennessee State, however, two things are apparent. First, the approach heretofore adopted by the state has not worked and, indeed, appears to contain no prospect of working. Second, the constitutional violation which the present racial composition of that institution constitutes is of a severe and egregious nature.

In such a situation, the interest of the state must give way to the constitutional requirement: defendants must carry out their "affirmative duty," and, if an open door policy will not work, then more radical remedies are required.[14]

With reference to the manner in which desegregation of Tennessee State University may be accomplished, the evidence heard by the court seemed in substantial agreement that white students would not be attracted to the school in any substantial numbers until there is what might be termed "white presence" on the campus. To provide this, it is ORDERED that defendants submit to the court by March 15, 1972, a plan to be implemented at the beginning of the 1972 academic year, such plan to provide, as a minimum, for the substantial desegregation of the faculty[15] at TSU and the allocation to the campus of TSU of programs which will *ensure*, in the opinion of defendants, a substantial "white presence" on the campus.

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[14] It should also be pointed out in the present context that ASTA makes very clear that, even if an open door policy were all – categorically – that was required, then even that is true *only* in the presence of "good faith." ASTA at 789. The court need not inquire into the presence *vel non* of "good faith" in the present context. However, *quaere:* does not the *fact* of a segregated school itself imply bad faith under the present circumstances? More specifically, is a state actually in good faith in not, on its own, going beyond a court order if such is necessary to remedy a blatantly unconstitutional situation, when it is within the state's power to do so? Is it not bad faith for a state to fail to do everything in its power to remedy injustice?

[15] As hereinbefore stated, defendants have continually asserted that a scarcity of black professors exists. The record does not show a similar scarcity of white professors. A method of transfers, using such inducements as may be necessary, should be feasible.

Defendants have at their command all of the information needed as to curricula and programs which may be utilized in complying with this order. It is pointed out to them that the court is aware of two programs which may be considered by them, *i.e.*, the duplicative nursing program at U.T.-Nashville and the School of Social Work, housed on the U.T.–Nashville campus but not a part of the school.

Again, the court reminds defendants that it is, for the present, leaving to them the exact procedures to be employed by them in complying with their constitutional duty. It is also pointed out to defendants that the court recognizes that compliance with the above order will not result in the adequate desegregation of TSU. Accordingly, it is further ORDERED that defendants consider additional methods for the accomplishment of this end and report thereon to the court by August 1, 1972. Such study and report should include the feasibility or non-feasibility of a merger or consolidation of Tennessee State[16] and U.T.-Nashville into a single institution, possibly with two campuses, under the aegis and control of either the Tennessee Board of Education, the Board of Trustees of the University of Tennessee, or a combination of the two, the feasibility or non-feasibility of curriculum consolidation of undergraduate and graduate programs of the State's

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[16] Although Tennessee State is generally referred to as a "regional" university, the court takes judicial notice of the fact that it was not so created and its very name implies the contrary. *Cf.* East Tennessee State University, Middle Tennessee State University, Memphis State University.

colleges in the general Nashville area, and such other matters as the defendants deem pertinent to the solution of the problem.

/s/ Frank Gray, Jr.

United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil No. 5077

RITA SANDERS GEIER, *et al.*,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

RAYMOND RICHARDSON, JR., *et al.*,
Plaintiff-Intervenors,

v.

WINFIELD DUNN, *et al.*,
Defendants.

ORDER

In response to the Order of this court entered February 15, 1974, the defendants in this case have submitted various proposals for an interim plan, to be implemented in the 1974-1975 school year, for dismantling the dual system of public higher education in the State of Tennessee. As has been true of this case, these proposals focus on Tennessee State University (TSU), the most egregious manifestation of the dualism resulting from Tennessee's *de jure* segregation. Objections and counter-

proposals were also filed by certain of the parties and a hearing had April 16, 1974.

With respect to TSU, the parties to this action, with the exception of the defendant University of Tennessee, agree that the most essential and effective approach to interim amelioration of segregation at that institution is the exclusive allocation of programs to it. There is disagreement, however, as to the number of programs which should, or successfully could, be so allocated at this time and as to additional steps to be taken in conjunction with any transfer. The court finds that one proper approach to interim action is exclusive program allocation.

The court must first deal with the scope of interim action to be ordered, *e.g.*, whether to confine this order to program allocation or to expand it by adopting certain of the other proposals relating to affirmative steps to enhance, and thereby equalize, minority access to the State's higher educational institutions. The court is of the opinion that this order should be confined to the program allocation matter due to the fact that long-range plans for complete dismantling of the dual system have been ordered to be filed in August of this year. This decision by the court should not be read as indicating that the defendants should take no further action immediately to continue the dismantling of the dual system. Of course, every such possible action should be taken by the institutions involved without the necessity of a court order.

Having thus decided so to restrict the scope of this order, the court now must turn to the subsidiary question raised in connection with program allocations and on which there is disagreement amoung the parties. These questions include how many and which program(s) to exclusively allocate to TSU and at which institution(s)

should the program(s) in question be terminated, as well as questions as to the feasibility and desirability of imposing geographical restrictions to limit competition for the allocated program(s) and as to the necessary financial arrangements incident to such allocation.

With respect to the matter of program allocation, the court has noted that the University of Tennessee at Nashville (UT-N) has no authority to offer a degree program in graduate education, but that courses leading to such a degree are offered at UT-N as a program of University of Tennessee at Knoxville (UT-K). Apparently, upon the completion of all required courses, the degree is awarded by UT-K although all of the studies have been completed at UT-N and have been taught by professors assigned to UT-N.

The court is of the opinion that the offering of such graduate education courses at UT-N, under any arrangement, should be terminated at the conclusion of the present school year, and that TSU have the exclusive right to offer such courses in Nashville for the next school year.

The court is further of the opinion that the record at this juncture does not support a decision to order transfer of programs from any of the other Middle Tennessee institutions or any decision with reference to geographical restrictions.

The court is further inclined to agree with the opinion of Dr. John K. Folger, Executive Director of the Tennessee Higher Education Commission, that the complexity of such a transfer and the necessity for its success compel exclusive allocation to be limited to one program at this time. Due to great demand for the graduate education courses, the greater incentive for students to

continue such courses, and the larger number of students involved, the graduate education courses are best suited for immediate exclusive allocation. It should be noted, however, that the court's decision in this regard is not to be interpreted as a holding that other programs should not be exclusively allocated to TSU in the future. Quite simply, the court is sensitive to the paramount need for a successful transition, and believes that allocation of the graduate education program offers the greatest chance for success.

The court having made the decision as to the minimum constitutional requirement to be fulfilled immediately, it is now the duty of the defendants to supply, from their experience in the field of education and administration, the detailed procedures to be followed. Accordingly, the court now directs the defendants to file with the court, within thirty (30) days after the entry of this order, a response covering such matters.

For reasons readily apparent from the record, the court designates the Tennessee Higher Education Commission, with the assistance of the Attorney General of the State, as the State agency responsible for drafting the response above required.

Such response shall include, *inter alia,* the provisions for the funding of the allocated program, including funding outside the funding formula, unless it can be clearly shown that such funding is unnecessary. Particular attention shall be given in drafting the program to all factors which the Commission determines will or may affect the success of the program.

IT IS SO ORDERED.

/s/ Frank Gray, Jr.

CHIEF JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil No. 5077

RITA SANDERS GEIER, *et al.*,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

RAYMOND RICHARDSON, JR., *et al.*,
Plaintiff-Intervenors,

v.

RAY BLANTON, *et al.*,
Defendants.

MEMORANDUM

As detailed *infra,* this lengthy litigation[1] culminated with a month-long evidentiary hearing (September 20 to October 20, 1976). At its conclusion the various parties were allowed time within which to submit proposed findings of fact.

The original plaintiffs filed a brief statement in lieu of detailed findings; however, Plaintiff-Intervenor United

[1] *See:* Sanders v. Ellington, 288 F. Supp. 937 (M.D. Tenn. 1968), and Geier v. Dunn, 337 F. Supp. 573 (M.D. Tenn. 1972).

States and Plaintiff-Intervenors Richardson, *et al.*, filed separate detailed proposed findings. There were two proposed findings of fact submitted by the defendants. The Attorney General of Tennessee filed such proposals for all State defendants except the University of Tennessee and its Board of Trustees, and the University of Tennessee, through private counsel, filed its proposals.

This action was originally filed by the plaintiffs, both white and black citizens of the State of Tennessee, to enjoin the proposed construction and expansion of the University of Tennessee-Nashville Center. The plaintiffs alleged, *inter alia*, that Tennessee Agricultural and Industrial State University, now Tennessee State University (hereinafter referred to as TSU), was originally established under State statute[2] as a State public higher education institution for the education of blacks, which statute was prima facie evidence of racial discrimination; that TSU was being maintained by State officials as a segregated black institution contrary to the Fourteenth Amendment to the Constitution of the United States, that appropriations for TSU were not provided on a basis equal to those of the State's predominantly white institutions; and that the new construction and expansion of the predominantly white University of Tennessee-Nashville Extension Center would serve to perpetuate TSU, also located in Nashville, as a segregated black institution which would ensure the continued existence of a dual system of public higher education in Tennessee. Based on the foregoing reasons, and others, the plaintiffs

[2]The statute cited by the plaintiffs was T.C.A. §49-3206, which stated that the purpose of TSU was ". . . . to train negro students in agriculture, home economics, trades and industry, and to prepare teachers for the elementary and high schools for negroes in the state."

requested that the State be enjoined from expanding the Nashville Extension Center, from providing unequal educational facilities, and from maintaining racially segregated institutions of higher education in Nashville.

Subsequently the United States moved to intervene in the action. The United States joined the plaintiffs in their allegations and requested relief, and, in addition, the United States requested that the State officials be required to formulate and submit to the Court a plan of desegregation designed to eliminate the dual system of public higher education in Tennessee. On July 22, 1968, the Court granted the motion of the United States for leave to intervene as a party plaintiff.

After a hearing conducted on August 19, 20 and 21, 1968, the Court delivered an opinion from the Bench, which opinion was followed by an Order on August 22, 1968, denying the requests of the plaintiffs and plaintiff-intervenor, the United States, to enjoin the proposed construction and expansion of the University of Tennessee-Nashville Center (hereinafter referred to as UT-N), but requiring the defendants to formulate and submit to the Court, by April 1, 1969, a plan designed to dismantle the dual system of higher education in Tennessee, with particular attention to TSU. In its opinion, filed in written form on August 23, 1968, *Sanders v. Ellington*, 288 F. Supp. 937 (M.D. Tenn. 1968), the Court found that a dual system of higher education had been established by law in Tennessee and that it had not been dismantled; that progress toward desegregating the traditionally white institutions in the eight years of an open-door policy had been slow as shown by the percentages of black enrollment ranging from 6 percent to about

7 percent at the individual universities,[3] that TSU still had a black enrollment in excess of 99 percent; and that the record at that time did not indicate that the proposed construction and operation of UT-N would necessarily perpetuate a dual system of higher education.[4] In reaching its decision, the Court did not find that the State's higher education officials had been guilty of any unconstitutional acts in the recent past, with emphasis on "recent." However, in light of "mistakes and inequities in the past," the Court held ". . . that there is an affirmative duty imposed upon the State by the Fourteenth Amendment to the Constitution of the United States to dismantle the dual system of higher education which presently exists in Tennessee." *Id.*, at 942. Noting that "the failure to make A & I [TSU] a viable, desegregated institution in the near future is going to lead to its continued deterioration as an institution of higher learning," the Court reiterated that the requested desegregation plan should place special emphasis on the desegregation of TSU. *Id.*, at 943.

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[3] At the time, Memphis State University enrolled the largest percentage of black students for the traditionally white institutions; approximately 7 percent of its total enrollment was black. Sanders v. Ellington, 288 F. Supp. 937, 940 (M.D. Tenn. 1968).

[4] After enumerating the purposes behind the proposed physical expansion of UT-N, the Court said:

> "There is nothing in the record to indicate that the University of Tennessee has any intention to make the Nashville Center a degree-granting day institution. On the contrary, the record clearly indicates and the court finds that, in its expansion program for the Nashville Center, the University of Tennessee seeks only to provide a quality continuing education and public service center for Nashville and Middle Tennessee with overwhelming emphasis being placed upon the provision of educational opportunity for employed persons of all races who must seek their education at night." *Id.*, at 941.

On April 1, 1969, the defendants filed a document styled "Plan for Desegregation of Higher Education Facilities in Tennessee." With respect to the desegregation of the State's traditionally white institutions, the Plan of 1969 stated generally the defendants' commitment to increase the number of black students, to establish close working relationships with the officials of predominantly black high schools, to set aside financial aid for minority students, to advise potential black students of the availability of financial aid programs, to conduct on-campus orientation programs for black students, and so on. With respect to the desegregation of TSU, the Plan of 1969 proposed that the defendants would recruit both white students and white faculty members for TSU, that the physical appearance of TSU would be upgraded to make it more attractive to students of all races, and that the defendants would give concentrated attention to developing and publicizing academic programs which would attract white and black students to TSU. The defendants decided that the best method of desegregating the two Nashville institutions, TSU and UT-N, would be to establish joint, cooperative, and exclusive program arrangements between the two institutions. The Plan did not specify any of the proposed program arrangements.

On December 23, 1969, the Court entered an Order on the defendants' Plan of April 1, 1969. In that Order the Court concluded that the defendants' Plan could be neither approved nor rejected. Specifically, the Court determined that "[t]he plan as submitted lacks specificity, in that there is no showing of funds to be expended, no statement of the number of students to be involved and, most importantly, no time schedules for either the implementation of the projects or the achievement of any goals." Also, the Court reiterated its previously

expressed conclusion ". . . that the State does have a Constitutional duty to dismantle any State-supported dual system of education, at any level." The defendants were directed to formulate and submit to the Court, on or before April 1, 1970, a report showing precisely what steps had been taken to implement each proposal in the Plan of 1969, including setting forth specific projected time schedules for such implementation.

The defendants filed the Court-ordered report on April 1, 1970. In general, the report stated that the black enrollment at the traditionally white institutions increased 42.2 percent, from 2,720 in 1968-1969 to 3,869 in 1969-1970, with most of the increase occurring on the freshman undergraduate level; that the percentages of black student enrollment in the individual senior institutions ranged from .8 percent to 10.2 percent; that the percentage of black faculty for all institutions had increased very little, from .4 percent to .9 percent; and that the amount of financial aid utilized by black students had increased substantially. With respect to the Nashville situation and TSU, the report stated that the white student enrollment at TSU decreased from 45 to 44; that there had been no significant increase in the number of white faculty at TSU (10 to 11); and that the defendants had failed to reach an agreement on the proposed joint UT-N - TSU engineering program. Subsequently, on June 14, 1971, the defendants filed another report showing that, while some more limited progress had been made by most of the predominantly white institutions in recruiting minority students, officials at the predominantly white institutions had not made any real progress in attracting black faculty. The report further showed that TSU was still overwhelmingly black with its percentage of 99.7 percent black

undergraduates and 99.9 percent black freshmen during the academic year 1970-1971, but that the State placed some hope for progress in a joint engineering program between UT-N and TSU, and a cooperative effort with UT-N, TSU, and Middle Tennessee State University (MTSU) for the Specialist in Education degree, which programs had been agreed upon by the relevant institutions.

Following a hearing on the progress, or lack thereof, evidenced by the reports summarized above, on February 3, 1972, the Court entered a Memorandum Opinion and Order, in which it concluded that the traditionally white institutions were "proceeding to dismantle their dual system of higher education, taken as a state-wide whole, at a constitutionally-permissible rate of speed," but that the TSU "phenomenon" remains. *Geier v. Dunn,* 337 F. Supp. 573, 580 (M.D. Tenn. 1972). In regard to TSU the Court found: "First, the approach heretofore adopted by the state has not worked and, indeed, appears to contain no prospect of working. Second, the constitutional violation which the present racial composition of that institution [TSU] constitutes is of a severe and egregious nature." *Id.,* at 581. The Court ordered the defendants to submit to the Court by March 15, 1972, "a plan . . . to provide, *as a minimum,* for the substantial desegregation of the faculty at TSU and the allocation to the campus of TSU of programs which will *ensure* [emphasis in original], in the opinion of defendants, a substantial 'white presence' on the campus." The Court further ordered the defendants to consider additional methods to desegregate TSU and to report such additional methods to the Court by August 1, 1972. Specifically, the Court required that the report consider the feasibility of a merger or consolida-

tion of TSU and UT-N and the feasibility or non-feasibility of curriculum consolidation of undergraduate and graduate programs offered by the State's colleges in the general Nashville area. *Geier v. Dunn*, 337 F. Supp. 573 (M.D. Tenn. 1972).

On March 27, 1972, following an extension, the defendants filed an interim plan for increasing the white presence on TSU's campus, pursuant to the Court's Order of February 3, 1972. Both the plaintiff and the plaintiff-intervenor United States filed objections to the defendants' interim plan. The Court entered an Order, on June 15, 1972, reserving final consideration of the defendants' interim plan proposals pending the filing of the previously ordered August 1, 1972 report. Pursuant to the Court's Orders of February 3, 1972, as amended on March 10, 1972, and June 15, 1972, the Tennessee Higher Education Commission (hereinafter referred to as THEC), the Board of Education[5] and the TSU defendants filed a report, which included, among other things, separate recommendations by THEC and TSU.[6] The UT-N defendants filed a separate report

[5]When this lawsuit was initiated, the State Board of Education was the governing board for Tennessee State University. Subsequently, the Board was dissolved and the State Board of Regents took its place to oversee all institutions of higher education outside of the University of Tennessee System.

[6]After noting that there had been little progress in the desegregation of TSU's student body, THEC stated that competition with UT-N and possible MTSU was TSU's main problem. While ruling out merger as unfeasible at the present time, THEC said merger might at some point be the way to complete the desegregation process. Instead of merger, THEC advised that exclusive program allocation was mandatory, and specifically suggested that all teacher education be moved to TSU. TSU's statement lauded merger under TSU as the only way to achieve desegregation.

on August 1, 1972.[7]

On July 31, 1972, a motion to intervene as additional parties plaintiff was filed by Raymond Richardson and others as black students, parents and faculty seeking relief from alleged racial discrimination and segregation in Tennessee's public institutions of higher education. The intervening plaintiffs also sought preliminary and permanent injunctive relief against the proposed creation of campuses for the Shelby State Community College in Shelby County, Tennessee, on the ground that such action would result in racially segregated community college campuses.[8] By Order of February 23, 1973, intervention on behalf of Raymond Richardson, *et al.*, was granted, but the intervenors were denied leave to file a desegregation plan.

On February 14, 1974, the defendants filed a document styled "Progress Report: Equal Opportunity in Tennessee's Colleges and Universities; Fall 1973." On February 15, 1974, the Court issued an Order, finding

[7]After discussing merger and ruling it out, the UT-N report stated that program consolidation was the best way to facilitate desegregation, specifically using cooperative programs. No exclusive program assignments were called for in the report.

[8]On May 8, 1973, these intervening plaintiffs filed a motion for injunctive relief to prohibit the creation of two campuses in Memphis (one at the suburban Penal Farm site and one at a Mid-Town site) for Shelby State Community College (SSCC). After a hearing on the proposed injunction, this Court, by Order of June 20, 1973, enjoined the defendants from construction of a campus of SSCC at the Penal Farm site. The Court found that ". . . immediate construction of both the Mid-Town and the Penal Farm campuses would be constitutionally impermissible as tending to promote segregation in the State's public institutions of higher learning and would be violative of defendants' affirmative duty to dismantle the dual system of public higher education in Tennessee." (Memorandum and Order, June 20, 1973, at 10-11.)

that the Progress Report of February 14, 1974, ". . . indicates to the Court that the progress reported therein has been minimal particularly at Tennessee State University in Nashville." The Court directed the defendants to submit to the Court, on or before March 8, 1974, an interim plan to be implemented for the 1974-1975 school year. In addition, the Court directed the defendants to submit, on or before August 1, 1974, a long range plan for desegregating Tennessee's public institutions of higher education; the Court also granted all other parties the right to submit a plan or suggestions by the same date.

Subsequently, the defendants submitted interim plans on April 1, 1974. THEC and the State Board of Regents[9] submitted a joint interim plan; the University of Tennessee submitted a separate interim plan. The interim plan submitted by THEC and the State Board of Regents contained the following statement:

> "Because of inability to resolve the basic differences between UT and Tennessee State about the future role of UT in Nashville, the defendants have been unable to reach interim agreements about program allocations, about the development of cooperative programs, or of other steps that involve joint action which would be designed to speed up integration in Nashville. In view of this, . . . the Higher Education Commission has prepared a statement which recommends action by the Court to bring about an exclusive program allocation to Tennessee State by the Fall of 1974."[10]

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[9] See note [5], *supra*.

[10] The statement referred to the disagreement discussed above in notes 6, 7, and accompanying text, *supra*.

Accordingly, THEC and the State Board of Regents recommended that, as an interim measure, responsibility for undergraduate engineering, undergraduate education or graduate education programs in the Nashville area be assigned exclusively to TSU. Objections to all the defendants' plans were filed by all plaintiffs, and UT filed objections to the plan of the other defendants. UT's objections condemned the exclusive assignment to TSU of any programs currently offered by UT-N, and UT's plan reiterated a commitment to desegregate the Nashville area through the use of joint and cooperative programs.

A hearing was conducted on the defendants' interim plans and the objections and counter-proposals of the plaintiff-parties on April 16, 1974. On April 19, 1974, the Court issued an Order requiring that the offering of graduate education courses at UT-N be terminated at the conclusion of the 1973-1974 school year, and that TSU have the exclusive right to offer such courses in Nashville for the next school year.[11] The Court took this action after determining that "[w]ith respect to TSU, the parties to this action, with the exception of the defendant University of Tennesee, agree that the most essential and effective approach to interim amelioration of segregation at that institution is the exclusive allocation of programs to it."

The defendants filed their Long Range Plan on July 25, 1974.[12] Regarding the desegregation of the Nash-

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[11] A motion, filed by the University of Tennessee defendants, to stay the effectuation of the Court's Order pending appeal was denied by the Court on July 2, 1974. The appeal was dismissed by UT on July 31, 1974.

[12] Defendants' Exhibit No. 10. The complete style of that document was "Long Range Plan for Achieving Additional Dese-

[footnote continued]

ville area, the defendants' Long Range Plan proposed in general that the defendants continue to utilize joint, cooperative and exclusive program arrangements. Additionally, the Long Range Plan projected goals and timetables for the enrollment of black students and the employment of black faculty for all institutions. On or about July 31, 1974, the plaintiff-intervenors, Raymond Richardson, *et al.*, filed the "Plan for the Dismantling of Tennessee's Dual System of Public Higher Education," in which the plaintiff-intervenors established goals and timetables for black student enrollment, the employment of black faculty and administrators, and the desegregation of Tennessee's higher education governance structure. With respect to the Nashville area the plaintiff-intervenors, Raymond Richardson, *et al.*, proposed that UT-N be absorbed by TSU. Subsequently, on October 11, 1974, the original plaintiffs filed the "Long Range Plan of Original Plaintiffs," in which they proposed that UT-N and TSU be merged into one institution with TSU as the surviving institution. Responses to the defendants' Long Range Plan were filed by both plaintiff-intervenors, condemning the plan as ineffective for achieving desegregation. The response of the United States, filed on October 10, 1974, was in effect a fourth plan calling for merger of TSU and UT-N over a period of five years with TSU resulting as the dominant institution.

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gregation of Public Higher Education in Tennessee." Henceforth, unless otherwise indicated, the term "Long Range Plan" refers to this plan. The defendants also include, as part of their Long Range Plan, the Progress Report, filed February 13, 1976 (defendants' Exhibit No. 11), and the minutes of the Monitoring Committee meetings (defendants' Exhibit No. 12). *See:* note 13 and accompanying text, *infra.*

On May 20, 1975, the defendant filed a "Progress Report on Implementation of Desegregation Plans," and, on February 13, 1976, the defendants filed their "Desegregation Progress Report."[13] This last progress report describes the progress, or lack thereof, achieved since the submission to the Court of the Long Range Plan, which Plan has been implemented by the defendants.

On or about June 21, 1976, the defendants filed a "Motion for Summary Judgment," urging the Court to grant their Motion on the sole basis of the progress shown in their Desegregation Progress Report. The Court denied the defendants' Motion and set the case to hear final proof on "the progress heretofore made towards eliminating the dual system and the prospects for the success of the plan now in effect as compared to the proposed results for any proposed plan." That hearing was held during the period of September 20, 1976, through October 20, 1976.

The primary issue before the Court is whether the defendants have met their constitutional duty to dismantle the dual system of public higher education in Tennessee. Since this system consists, on the one hand, of the predominantly white institutions across the State, and, on the other hand, the overwhelmingly black Tennessee State University, and since all of the proposed remedies are addressed to these two prongs of the problem, the Court will consider separately the state-wide and Nashville situations.[14]

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[13] Henceforth, unless otherwise indicated, the term "Progress Report" refers to the "Desegregation Progress Report" dated February 15, 1976.

[14] The previously reported opinions in this case have dealt with two prongs of the State's problem, the state-wide system consis-

[footnote continued]

In its 1972 opinion, *Geier v. Dunn, supra,* this Court found that, with respect to the state-wide system of predominantly white institutions, the defendant's "present programs and policies would appear to satisfy constitutional requirements as to these schools." *Id.*, at 581.

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ting of the predominantly white institutions, and the peculiar situation in the Nashville area. On the one hand, the Court found that, at the time of its 1972 opinion, the defendants were making acceptable progress in attracting blacks on a state-wide basis; on the other hand, the Court found that no progress was being made in the Nashville area where one predominantly white institution stood alongside an overwhelmingly black institution. Geier v. Dunn, *supra.*

Since the Court's 1972 opinion, at least one case has dealt with the general approach to be taken in higher education desegregation actions. In Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973), the Court of Appeals, sitting *en banc*, decreed that the problem of desegregating higher education must be dealt with on a state-wide basis rather than a school-by-school basis. At first glance, this case appears to conflict with the approach taken previously by this Court, since its opinions in effect considered the State's problem two-pronged. However, the Adams opinion went on to recognize that any good state-wide plan must give special attention to black institutions:

> "A predicate for minority access to quality post graduate programs is a viable, coordinated state-wide higher-education policy that takes into account the special problems of minority students and of Black colleges. . . . [T]hese Black institutions currently fulfill a crucial need and will continue to play a crucial role in Black higher education." *Id.* at 1164-65.

In Tennessee, the sole black institution, TSU, is the heart of the dual system and warrants special attention. As this Court said in 1972:

> "[T]he phenomenon of a black Tennessee State, so long as it exists, negates both the contention that the defendants have dismantled the dual system of public higher education in Tennessee, . . . and the contention that they are, in any realistic sense, on their way toward doing so." Geier v. Dunn, *supra*, at 576.

This conclusion was based on the finding that significant progress in attracting black students had been made by the white institutions and that black enrollment at these institutions had increased on a regular basis between 1968 and 1972. Although approving the defendants' policies, the Court found some disappointing results in the ability of the white institutions to attract black faculty members.

The Progress Report filed in February, 1976, reveals that the steady increase in black enrollment at the predominantly white institutions has continued. The Report shows the following regular progression of black enrollment in terms of percentages of total enrollment:

	1969	*1970*	*1971*	*1972*	*1973*	*1974*	*1975*
Without TSU	4.6	5.2	5.8	6.7	7.1	8.8	9.7
With TSU	9.5	9.6	9.8	10.3	10.7	11.9	12.6

(Progress Report, February 13, 1976, p. 134.)

Efforts to increase black faculty at these predominantly white institutions have been less productive. Over 55 percent of the black faculty members are employed at two institutions, Shelby State Community College in Memphis and TSU.[15] However, the progression of black faculty since 1969 shows a small, but steady, increase:

	1969	*1971*	*1973*	*1974*	*1975*
Without TSU	1.1	1.4	2.4	2.8	3.1
With TSU	5.9	5.3	5.7	5.7	5.9

(Progress Report, February 13, 1976, p. 140.)

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[15]The Report shows that, out of a total of 389 black faculty members in 1975, 190 were employed by TSU and 24 were employed by Shelby State Community College (Progress Report, February 13, 1976, p. 140).

Moreover, the record shows the difficulties in recruiting black faculty members due to demand in other state and private institutions which are able to offer more lucrative positions.[16]

Since the predominantly white institutions are continuing to make steady progress, the Court finds it unnecessary to evaluate the specific policies and goals contained in the Long Range Plan. The Court expects, however, that the Monitoring Committee will function as outlined in the Plan and will call to task any institution which does not achieve steady progress. This Court will retain jurisdiction so that, should the state-wide progress be abated, it may consider specific State policies as they relate to the decline in progress.

Although the white institutions are making steady progress toward desegregation, the process of dismantling the dual system of higher education in Tennessee is complicated by the peculiar situation in Nashville. As discussed above, this case was originally filed to block the

[16]The record shows that the same problems exist in the recruitment of black administrators. These problems are further complicated by the fact that administrators often are promoted from the faculty. Some progress, however, is demonstrated by the Progress Report which states that, between 1974 and 1975, ". . . the number of black persons in institutional administrative posts increased about 18 percent statewide, from 9.8% to 10.7% while the total number of administrators increased only about 7%." Furthermore, the Report states that "[i]f TSU is excluded from the calculation, then the number of black administrators increased 22.5 percent between Fall, 1974, and Fall, 1975, or from 71 in Fall, 1974, to 87 in Fall, 1975." (Progress Report, February 13, 1976, p. 12.) The distribution of black administrators among the defendants' institutions is similar to black faculty distribution. In 1975 the defendants employed a total of 172 black administrative personnel; 97, or 56 percent, were employed by TSU and Shelby State. (*Id.*, at 142.)

construction and the expansion of the predominantly white University of Tennessee at Nashville on the grounds that UT-N's mere existence alongside Tennessee State University served to perpetuate TSU as a segregated black institution and ensured the continued existence of the dual system of higher education in Tennessee. In its 1968 opinion, this Court dismissed for the time being the allegation that the two institutions were involved in a competitive situation which fostered dualism. Noting UT-N's overwhelming emphasis on evening education for the employed, the Court determined that the existence and expansion of UT-N would not "necessarily perpetuate a dual system of higher education," and, indeed, might play an important role in establishing a unitary system. *Sanders v. Ellington, supra,* at 941.

At the time of this Court's 1968 opinion, TSU's student body was over 99 percent black. While, as discussed above, the predominantly white institutions began to make relatively slow but steady progress in terms of black enrollment under the Court's order to take affirmative action, TSU was making no progress in attracting white students. Ruling on the State's first plan for desegregation, filed on April 1, 1969, and its subsequent progress reports, the Court determined in 1972 that the plan's approach to TSU and to the Nashville situation was not working, since 99.7 percent of TSU's undergraduate enrollment and 99.9 percent of its entering freshmen were black. Moreover, the Court noted that 81 percent of TSU's faculty was black during the 1970-1971 period. *Geier v. Dunn, supra,* at 576.

Today, over 60 years after the State's establishment of TSU as an institution for negroes and over 8 years after the Court's initial mandate to desegregate, TSU's student population is still overwhelmingly black. The

February 1976 Progress Report reveals that the enrollment at TSU in fall, 1975, was about 85 percent black and about 12.2 percent white. However, the proportion of whites on the main campus had not changed since the previous year and remained at about 7 percent, leading to the conclusion that a great number of the white students enrolled at TSU were actually taking courses in off-campus centers, since over 80 percent of the students in these centers were white. (Progress Report, February 13, 1976, pp. 38, 42, 48.) Progress was reported in the area of faculty recruitment, as black faculty at TSU dropped to 68.84 percent of the total. (*Id.*, at 43.) By way of contrast, since the filing of this suit, while UT-N has grown from a small extension program of the University of Tennessee at Knoxville to a degree-granting institution with full campus status (from 1,788 students to 5,828 students), UT-N has remained predominantly white with 12.7 percent total black enrollment in the fall, 1975. (*Id.*, at 37.) Black faculty at UT-N did not advance in 1975; the percentage dropped from 4.3 percent in 1974 to 4.1 percent in 1975 with the number of black faculty members remaining at five. (*Id.*, at 43.)

The Court now finds that the existence and expansion of predominantly white UT-N alongside the traditionally black TSU have fostered competition for white students and thus have impeded the dismantling of the dual system.

The competition for white students between the two four-year degree-granting institutions was recognized early by the Tennessee Higher Education Commission in a report filed on July 31, 1972, which stated in part:

> "The only successful large scale desegregation of formerly black institutions has come by attracting adult, largely part-time commuting students, mostly enrolling in evening classes. This is the type of students that U.T. Nashville has been developed to serve, and U.T. Nashville provides the biggest competition to Tennessee State in its efforts to attract white students." (THEC Report, July 31, 1972, p. 4.)[17]

The best evidence of the competitive nature of the Nashville situation is found in the similar programs offered by both institutions. A comparative list of some of the common programs offered by the two Nashville institutions are as follows:

TSU Programs	*UT-N Programs*
Nursing	Nursing
Engineering (specialized)[18]	Engineering (general)
Undergraduate Education	Undergraduate Education
Arts and Science	Arts and Science
Business Administration (within school of education)	Business Administration
Fine Arts/Music	Commercial Arts/Music

These programs have remained predominantly one-race at each institution. For example, in the fall of 1976, TSU's Department of Arts and Sciences had a total enrollment of 1,629 students, of which 1,590, or 97.6 percent, were black; UT-N's Division of Arts and Sciences had a total enrollment of 1,895 students, of which 1,521, or 80.3 percent, were white. For the same period, TSU's Department of Business Administration enrolled 800 students, of which 785, or 98.1 percent, were black; UT-N's Divi-

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[17] THEC's report also notes that Middle Tennessee State University also offers substantial competition to TSU in the attraction of white students. (THEC Report, p. 4.)

[18] Although testimony was offered at trial to distinguish the specialized engineering course from the program in general engineering, this Court is not convinced that they are entirely different programs.

sion of Business Administration enrolled 2,098 students, of which 1,828, or 87.1 percent, were white. (Defendants' exhibits numbers 36, 61 and 68.)

The defendants have sought repeatedly to show that the two schools are not competing institutions because UT-N was established to serve working adults who wish to attend college on a part-time basis after 4:00 p.m., while TSU was established as a land-grant institution to serve the traditional younger college student.[19] In deciding this case, the Court must recognize that, up to this date, the pattern of student enrollment in Nashville has been that white students have overwhelmingly enrolled at UT-N, as part-time evening students, and that black students have overwhelmingly enrolled at TSU as daytime students. This pattern of enrollment does not appear to be just coincidental but appears to be a vestige of the former state-imposed dual system of public higher education in the State of Tennessee. Moreover, even if the average student profile at UT-N shows that those students are older and are employed, these are the kind of white students that THEC and Dr. Elias Blake,[20] witness for the United States, say that TSU must attract if it is to prosper. (THEC Report, July 31, 1972; testimony of Dr. Elias Blake.)

The competition for students between UT-N and TSU is roughly paralleled by the situation in Memphis several years ago which was described extensively by Dr.

[19]Defendants' exhibits numbers 28, 66; additional exhibit requested by intervening plaintiffs conveyed to Court by letter of November 4, 1976, from Mr. Thomas Wardlaw Steele, UT counsel.

[20]President of the Institute for Services to Education, Washington, D.C.

Cecil Humphreys, former president of Memphis State University (hereinafter referred to as MSU). About the same time that the University of Tennessee Board of Trustees initiated its Nashville Center, it opened a comparable extension center in Memphis, where courses were offered during the evenings primarily for working adults, which courses could be used for credit at an accredited institution. In the 1950's, MSU, which had been operating prior to the initiation of the UT-Memphis Center, began to offer evening programs at its own campus, located four to five miles from the UT Center. At the hearing, Dr. Humphreys stated that MSU and the UT Center were in competition for students and that MSU was handicapped in its ability to compete because a UT degree had greater prestige. As was stated in a history of the later established Joint University Center: "For reasons unknown to many but understandable by a few, many University of Tennessee downtown students drove past the Memphis State University Campus to take classes." (Plaintiff-Intervenor Richardson's Exhibit No. 44, "THE JOINT UNIVERSITY CENTER: A NARRATIVE ON ITS HISTORY AND PRESENT STATE OF REPAIR," p. 2.) In the 1960's MSU established a center downtown close to the UT Center and was able to thwart the granting of resident center status to UT, which would have made the center more attractive to students. Concern was expressed about the duplication of programs offered at the two institutions, which concern eventually resulted in the establishment of a Joint University Center in which MSU plays the primary role.[21]

It is clear from the above discussion that the growth of UT in Memphis was cut off by MSU's efforts to

[21]See Plaintiff-Intervenor Richardson's exhibits 43 and 44.

attract a large part of the evening students in Memphis. The Court expresses no opinion as to whether TSU officials were at fault in not expanding their programs to compete with UT-N, as did MSU, or as to whether UT-N's existence kept TSU from so expanding. However, the fact remains that UT-N and TSU are in competition for students just as were MSU and the UT-Memphis Center. With TSU's black history and UT's prestige, this competition inevitably fosters dualism.

In its 1972 opinion, the Court charged the defendants with the responsibility of allocating programs to TSU which would ensure a substantial "white presence on the campus." Specifically, the Court pointed toward the duplicative nursing program at UT-N and the UT School of Social Work then housed at UT-N as examples of programs to consider. Furthermore, the Court recognized that the foregoing action would not result in the adequate desegregation of TSU and ordered the defendants to consider additional methods for desegregation, including the feasibility of merger and of curriculum consolidation of the Nashville institutions. *Geier v. Dunn, supra.* After finding that the defendants' interim plans ordered by the Court in its previous opinions had not been effective in desegregating TSU, the Court, on February 15, 1974, directed the defendant to file a new interim plan for 1974-1975 and a long range plan for the State. All of these orders were, for the most part, attempts by the Court to do something about the competition for white students in the Nashville area. The Court now finds that, with respect to the Nashville area, the defendants' plans have not produced the desired result.

From the first plan filed by the defendants through the Long Range Plan now in effect, the defendants have

sought to achieve the ordered progress at TSU by utilizing certain joint and cooperative programs between UT-N and TSU (sometimes also Middle Tennessee State University and Austin Peay), and by providing exclusive program assignments for the two Nashville institutions. The record clearly shows that this approach "has not worked and, indeed, appears to contain no prospect of working." *Geier v. Dunn, supra,* at 581.

It appears appropriate for the Court to review the record with respect to the success or lack of success of the joint, cooperative and exclusive programs which have been implemented.

The Long Range Plan defines a joint program as one leading to a joint degree in which some of the course work must be done at one institution and some at another, and in which the faculty of both institutions are involved in planning and teaching.[22] Only two programs included in the Long Range Plan meet this definition.

The first of these programs, the joint degree in general engineering between UT-N and TSU, is admittedly a failure. The program was put into effect in 1971 and was reevaluated in 1976. The report, prepared by the Ad Hoc Committee on the TSU/UT-N Joint Engineering Program and presented to the Monitoring Committee on September 13, 1976, concluded that the program had not attracted significant numbers of TSU students, and was, therefore, never effective in enhancing the white presence on that campus. The Committee attributed the program's failure to the differences in clienteles at the two institutions and the differences in academic calendars between TSU and

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[22]Defendants' Exhibit No. 1, Long Range Plan, part 3, p. 2.

UT-N (TSU is on the semester system while UT-N is on the quarter system). The Committee recommended that the program be terminated.[23]

The only other joint program as defined in the Long Range Plan is a joint masters in public administration between UT-N, TSU and MTSU. At the hearing it was learned that the first class had been enrolled for fall, 1976, with TSU being designated as the first coordinating institution. Although this program is new and cannot therefore be evaluated fully as to its impact, the Court must take notice of the problems encountered with the joint engineering program discussed previously. These two problems are present with any joint program involving UT-N and TSU, so the Court must find that the prospects for the program's success are not good.

Cooperative programs are defined by the Long Range Plan as programs which make it easier but do not require students to take work on both campuses, by facilitating student exchange of credits. In these programs the institutions may also agree to cooperate in other ways such as in the exchange of faculty.[24] Although these programs are defined, no cooperative academic credit programs involving both UT-N and TSU are identified.[25] The

[23]Defendants' Exhibit No. 8, Report of the Ad Hoc Committee on the TSU/UT-N Joint Engineering Program, p. 2. The Committee recommended that the following be instituted: that UT-N have the sole responsibility for the baccalaureate general engineering program and that TSU have the only specialized undergraduate engineering programs; that UT-N students not be permitted to take more than 24 of the 32 quarter hours required in each technical elective in specialized areas; that TSU develop a masters of engineering; and that UT-N develop a masters of engineering administration. *Id.*, at 3.

[24]Defendants' Exhibit No. 10, Long Range Plan, part 3, p. 2.

[25]There is a cooperative agreement for the Education Specialist Degree between MTSU, Austin Peay and TSU.

February 1976 Progress Report discusses several proposed noncredit programs such as inservice-type programs for teachers, career education conferences, workshops, and the like, but the Report does not describe these programs with specificity or show how these programs have contributed or will contribute to the desegregation of either campus. The record thus shows that the joint or cooperative programs have had no appreciable impact on the desegregation of TSU.

The exclusive programs provided by the defendants are divided into two types: (1) those "exclusively" assigned to TSU during the day with UT-N having the opportunity to offer them after 4:00 p.m.; and (2) those programs offered at only one of the institutions. As noted above, with reference to the fall, 1976, statistics,[26] the programs which are "exclusively" assigned on the basis of time offered are overwhelmingly black at TSU (ranging from 97.6 percent black in the Arts and Science program to 87.1 percent black in the engineering program), and predominantly white at UT-N (ranging from 90.9 percent white in the engineering program to 79.8 percent white in the undergraduate education program). With reference to some of those courses that are offered only at TSU, the Criminal Justice Program is 95.3 percent black, and Allied Health (excluding nursing)[27] is about 80 percent

[26]Defendants' exhibits numbers 5, 36, 61 and 68.

[27]Nursing is the only program which is offered by both institutions on a non-exclusive basis, as both programs operate during the day. These programs show more integration than the exclusive programs discussed previously. The 1976 statistics reveal that UT-N's nursing program is 75.1 percent white (including pre-nursing), while TSU's program is 63.2 percent black, according to Dr. Bond's testimony, or 70.9 percent black, according to Defendants' Exhibit No. 36. See note 28, *infra;* defendants' exhibits numbers 5, 36, 61, 68.

black.[28] The only truly successful exclusive program is the graduate teacher education program which was given exclusively to TSU by Court Order on April 19, 1974, because an agreement to do so could not be reached among the parties.[29] The record shows that the exclusive graduate teacher education program at TSU is the only program which has been able to attract a substantial number of white students. In the fall of 1973, before TSU was assigned exclusive responsibility for the graduate teacher education program, TSU enrolled 67 white students in its graduate program. In the fall of 1976, two years after the exclusive assignment, the racial composition of the program was approximately 313 blacks (53 percent) and 275 whites (47 percent).[30]

Thus, the Court finds that two programs account for the majority of TSU's white enrollees: the exclusive graduate education program and the off-campus centers

[28]Defendants' Exhibit No. 36 shows the enrollment of the Allied Health program, excluding nursing, as 77.4 percent black with 144 blacks out of a total of 186. Dr. Frederick Humphries testified that this exhibit represented tentative enrollment data for fall, 1976, which were acquired from the heads of the various programs in time for the hearing, and it included no figures for Health Care, Administration, and Planning. Dr. Andrew Bond, Dean of the School of Allied Health, presented a slightly different breakdown of students, which included the Health Care program, stating that the School of Allied Health, excluding nursing, was 84.6 percent black, with 209 blacks out of 247 students enrolled. See Defendants' Exhibit No. 5.

[29]See discussion, *supra,* at p. 10.

[30]Defendants' Exhibits Nos. 36, 68; report of Drs. Reeves and Witherspoon of TSU to the Monitoring Committee, included in Defendants' Exhibit No. 12. Dr. Frederick Humphries' testimony was unclear as to whether these 1976 figures included off-campus whites enrolled in the graduate teacher education program. If they were not included, the percentage of whites to the total number enrolled might well be higher than 47 percent.

program. As noted above, the February 1976 Progress Report states that the percentage of white students on campus remained at 7 percent in the fall of 1975, while the total number of whites enrolled increased to 12.2 percent in 1975. This conclusion that most of TSU's whites are still in the off-campus centers can also be drawn from TSU's tentative enrollment figures for 1976.[31]

From the foregoing discussion, it appears to the Court that the State's approach utilizing joint, cooperative and exclusive program planning has not eliminated the competition between UT-N and TSU, and past failures leave little hope fur future progress. The hope for future progress is further dimmed by the historical inability of the defendants to agree among themselves as to the proper course of action, and by the reluctance of the politically powerful University of Tennessee to take significant steps to eradicate dualism in Nashville.

Both the division between the boards governing UT-N and TSU and the power of the University of Tennessee System is demonstrated at the outset by counsel for the defendants. From the beginning, the University of Tennessee and its Board of Trustees have retained their own counsel. In the initial stages of the action, UT was represented by in-house counsel; in the latter stages, private counsel was retained by the System. The remaining defendants, including the Board of Regents as the governing board of TSU (before 1972, the Board of Education), and the Tennessee Higher Education Commission (the central governing board) have been represented by the Attorney General for the State of Tennessee, whose duties include, *inter alia,* the defense of "any and all suits . . . in any of the district courts of the

[31]See Defendants' Exhibit No. 36.

United States held in the State of Tennessee, in which suit or suits the state may be a party, or in which the state has or may have an interest of a pecuniary nature." T.C.A. § 8-610 (1973).

The division among the defendants appeared most destructive after the Court's 1972 opinion requiring the allocation of courses to TSU that would ensure a white presence on campus, and a feasibility study of merger and curriculum consolidation. THEC filed a report on July 31, 1972,[32] suggesting that, while merger was not appropriate at that time, the competition for white students between TSU and UT-N could be ameliorated by assigning all teacher education in Nashville exclusively to TSU. TSU filed a separate statement on the same date calling for merger under TSU, while UT filed a statement on August 1, 1972, rejecting merger under either institution and suggesting cooperative-type programs as the primary means for achieving desegregation.

In April, 1974, the disagreements were heightened by the submission of separate interim plans. Reporting that it could not resolve differences about the role of UT in Nashville, THEC suggested that undergraduate engineering, undergraduate education, or graduate education be moved exclusively to TSU by Court order.[33] The University of Tennessee also filed an interim plan which rejected merger as an alternative and said of the exclusive program allocation proposed by THEC:

> "However, proposals for such assignments advanced by the THEC staff have placed the entire burden

[32] See discussion, *supra*, at *p. 8.*

[33] See discussion, *supra*, at *p. 10.*

> of desegregation on UT-N, without regard to other middle Tennessee institutions." UT Interim Plan, April 1, 1974, p. 2.

On April 10, 1974, the University of Tennessee espoused further its opinions on exclusive program allocation:

> "The University of Tennessee does believe that the allocation of new programs between or among middle Tennessee institutions is a promising way to promote further desegregation. . . .
>
> ". . . .
>
> "The University of Tennessee stands ready to work with the Tennessee Higher Education Commission and the State Board of Regents in developing a plan for assignment of future exclusive programs. . . but does not accept the discontinuance of existing programs at the University of Tennessee at Nashville as a viable method for desegregating the TSU campus." U.T. Objections, April 10, 1974, pp. 6, 8.

Thus, although the agreement has been reached to implement the Long Range Plan and a spirit of greater cooperation among the defendants was apparent at the recent hearing of this case, the Court takes notice that program allocations have, for the most part, followed the wishes expressed by the University of Tennessee. Although the graduate teacher education program assigned to TSU by the Court Order has been the most successful program in terms of racial impact, the Long Range Plan does not contemplate any proposal for similar allocations in the other areas proposed by THEC.

Most importantly, when a disagreement occurs among the institutions or governing boards, THEC has no power to resolve it. This problem of disagreement was addressed specifically by Dr. Elias Blake, witness for the

United States Dr. Blake testified that the first and major problem with the exclusive program allocation approach is the problem of governance. Without a strong central authority, each side must agree. When deciding on programs for desegregation, the issue becomes what types of programs are most attractive to both races. Because no institution "worth its salt" wants to give up those types of programs, disagreements invariably result. Thus, the lack of power on the part of THEC is a weakness which leaves in doubt further progress in Nashville.

In the foregoing discussion, the Court has found that the defendants' approach to eliminating the effects of State-imposed segregation in the Nashville area institutions has not worked and that it offers no real hope for further progress in that direction. Therefore, the Court finds that "more radical remedies are required." *Geier v. Dunn, supra,* at 581.

The only approach proposed by the parties plaintiff is the merger of TSU and UT-N. The defendant THEC addressed this possibility in its report filed July 31, 1972, which stated: "[A] merger of Tennessee State and U.T. Nashville does not appear to be feasible *at the present time [1972], although this may be necessary at some time in the future to complete the desegregation process and to eliminate duplication and overlapping of programs.*" [Emphasis supplied.] (THEC Report, July 31, 1972, p. 7.) Although rejecting merger for the moment, THEC recognized in its report that UT-N was engaged in competition with TSU for white students, which competition this Court has previously found to exist. THEC's proposals at that time were basically the same as those in the Long Range Plan. Since joint, cooperative and exclusive programming has not resulted in progress toward eliminating the dual system in Nashville, while Tennessee's predominantly white institutions on a state-wide basis are making genuine progress towards that end, the Court finds at this time that the only reasonable alternative is the merger of TSU and UT-N into a single institution under a single governing board.

Expert testimony in the record, including some testimony by the defendants' own experts, shows that merger is the best long range solution for desegregating the Nashville area. Dr. Prince A. Jackson,[34] one of four consultants employed by the defendants, testified as follows:

> "The consultant group, as we drew up the plan, we talked about merging the two schools and we looked at the advantages and the disadvantages of merging. And I suppose every consultant in the group had his own personal reasons as to why he didn't think that a merger at this time would work, even though down to the last one of us we felt that eventually somewhere in the future, and maybe over the next two or three decades, that the situation would get to the point where you would have one institution in Nashville." (Deposition of Prince A. Jackson p. 89.)

Dr. Robert W. French,[35] another of defendants' consultants, gave some compelling educational and economic reasons for merging UT-N and TSU. Dr. French stated that the principal reasons for merger include:

> "(a) Focus it will place on providing public higher educational opportunities to the Nashville

[34] President of Savannah State College, Savannah, Georgia.

[35] Assistant to the President of the University of Alabama, Birmingham Campus.

area in a completely coordinated, comprehensive fashion.

"(b) Enlarged opportunities for interinstitutional cooperation.

"(c) Economy.

"(d) Educational efficiency.

"(e) Greater likelihood of developing a truly urban university in metropolitan Nashville." (Deposition of Dr. Robert French, Exhibit No. 11 thereto.)[36]

The defendants' remaining two consultants also indicated a merger of TSU and UT-N might be necessary for desegregating the Nashville area. Dr. James Godard[37] stated that he did not think a merger *at this time* was the best answer, because he believed that the approach of joint, cooperative and exclusive programs should be given a serious try. (Deposition of Dr. James Godard, p. 109.) Dr. Anne Pruitt[38] stated that merger was a reasonable alternative; however, she also believed that if there were such a merger that steps should be taken to ensure that the merger did not bring about a decrease in black faculty and administrators or the number of black students enrolling in Tennessee's higher education institutions. (Deposition of Dr. Anne Pruitt, pp. 47-53.)

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[36] Dr. French also stated that "certain difficulties" would accompany such a merger, such as: (a) Loss of two prestigious and meaningful names, (b) probable reduction in public image, (c) rearrangements in governance; and (d) some educational dislocations.

[37] Dr. Godard is a Special Consultant to the Institute for Higher Educational Opportunity of the Southern Regional Education Board, in Atlanta, Georgia.

[38] Dr. Pruitt is a professor in the Department of Education, Case Western Reserve University, Cleveland, Ohio.

Expert testimony submitted by the plaintiff-intervenors, Raymond Richardson, *et al.*, also reveals that the merger of UT-N and TSU is the best long range solution to the Nashville area problem. Dr. Albert H. Berrian[39] testified that he believed that the gradual merger of UT-N and TSU into a single institution would be the best long range solution to the Nashville problem. Dr. Berrian testified that the merger should take place over a period of years with UT-N supporting TSU and TSU gradually taking over the programs offered at UT-N. It is noteworthy that Dr. Berrian believed that the fact that UT-N and TSU were governed by different boards was a "built-in conflict" with respect to the desegregation of the Nashville area. (Affidavit of Dr. Albert H. Berrian, filed August 30, 1976; testimony of Dr. Berrian.)

Lastly, the three consultants employed by the United States[40] stated that the most promising approach for desegregating the Nashville area would be to merge TSU and UT-N into one institution over a period of several years, with TSU as the surviving institution. The United States' consultants have also recommended that as a part of the merger steps should be taken to remedy the vestiges of past discriminatory actions by strengthening TSU to the point that it will have adequate programs, facilities and funding to properly service the Nashville area. (Testimony of Dr. Elias Blake, Jr.; deposition of

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[39] Dr. Berrian is Vice-President of the Institute for Services to Education, Washington, D.C.

[40] Dr. Steven J. Wright, Vice-President of the College Entrance Examination Board; Dr. Joseph Cosand, Professor of Higher Education and Director of the Center for the Study of Higher Education at the University of Michigan, Ann Arbor, Michigan; Dr. Elias Blake, Jr., President of the Institute for Services to Education, Washington, D.C.

Dr. Blake, pp. 5, 10-34, 96-101; depositions of Dr. Joseph Cosand, pp. 10-12, and Dr. Stephen J. Wright, pp. 98-107, 110-114.)

The record also shows that several of the defendant officials believe that at some point it will be necessary to merge TSU and UT-N into a single institution. At the recent hearing Dr. Wayne Brown, Executive Director, Tennessee Higher Education Commission, and Mr. Walter Armstrong, past Chairman, Tennessee Higher Education Commission, both testified that the merger of TSU and UT-N will arise through a natural evolution, although they disagreed on the amount of time it would take to reach a merger.[41]

The record further shows that the Ad Hoc Committee, which developed the Long Range Plan, considered the merger of UT-N and TSU, but the Committee's members were unable to agree under which governing board the new institution should be placed. The Committee members therefore arrived at the "compromise" of continuing the existence of both UT-N and TSU and utilizing joint and cooperative programs as the "approach" for desegregating the Nashville area, which plan was the strongest plan that the three boards could agree upon. (Deposition of Johnella H. Martin, pp. 16-17.)

The record shows that the defendants have given three chief reasons for not merging TSU and UT-N: (1) that the approach of joint, cooperative and exclusive programs should be tried; (2) that merger will create disruption in the higher education process; (3) that white flight to other institutions will result if merger under TSU is

[41] Dr. Brown qualified his position by stating that he foresaw such a high degree of cooperation that the issue of merger would become moot.

effected. (Long Range Plan, Introduction, Defendants' Exhibit No. 10; testimony of Mr. Walter Armstrong and Dr. Wayne Brown; deposition of Dr. Brown, p. 13; deposition of Mr. Armstrong, p. 35.) With respect to the first reason, the record clearly shows that the approach of joint, cooperative and exclusive programs heretofore utilized by the defendants has not worked and shows no promise of working. The second reason appears to be speculation on the part of certain defendant officials, as there is no evidence in the record to show that the merger of TSU and UT-N over a period of time would bring about any "disruption." Similarly, the third reason appears to be speculation on the part of several witnesses for the defendants, since none of the witnesses came forth with any evidence from mergers similar to the proposed one. Indeed, most of the witnesses did not know of a merger of one institution into another, except for Dr. Blake who testified to an absorption of one institution by another in Washington, D.C.

In summary, when the record is considered regarding alternative approaches of desegregating the Nashville area, two things become apparent. First, the expert witnesses all believe that merger is an acceptable approach for desegregating the Nashville area, with most of the expert witnesses believing that merger is the best long range solution. Second, most of the expert witnesses and several of the defendant officials believe that eventually there will be one institution in Nashville. Consequently, the evidence overwhelmingly supports merging the two Nashville institutions under one governing board.

As to which governing board should operate the merged institution, the record contains little testimony in support of merger under UT-N. Neither the record nor the historical facts would support placing the merged

institution under the UT Board of Trustees. TSU is a land-grant university with a 60-year history. UT-N is a newly created branch of the UT system which has become a degree-granting campus during the period of this litigation. For the Board of Trustees of UT to take over the merged institution would mean the elimination of TSU as an educational institution with all the concomitant losses entailed therein.

The Court is further of the opinion that merger under the Board of Regents should provide additional advantages with respect to the goal of desegregation since the other three State institutions of higher education in Middle Tennessee are under this Board. Any problems of competition or duplicative programs can obviously best be handled by one governing board.

The Court rejects the proposal of plaintiff-intervenors Richardson, *et al.*, that immediate merger should be directed, feeling that such precipitate action might well result in needless disruption and possibly the temporary loss of some educational services to the Nashville area.

The Court finds that merger under the Board of Regents, with UT-N supporting TSU during the transition period, as suggested by the witness Dr. Albert H. Berrian, offers the best prospect for success. It further finds that the merger should be completed within three (3) years from July 1, 1977.

Although this Court finds that merger is the best solution to the Nashville area problem, the remedy of merger is admittedly a radical remedy. In light of recent Supreme Court decisions limiting federal remedial powers in desegregation cases, the Court finds it necessary to briefly comment on merger in the context of one of these opinions.

In *Austin Independent School District v. United States*, 45 U.S.L.W. 3413 (Dec. 1976), the Supreme Court reversed the Fifth Circuit Court of Appeals approval of a requirement of extensive cross-town busing to achieve a certain degree of racial balance in every school.[42] In reversing, the Supreme Court determined that the Court had abused its remedial powers, which may only be used in the face of a constitutional violation and which, if used, may not exceed the effect of the constitutional violation. In the initial stages of this case, the first criterion was met: the establishment by State statute of a dual system of higher education was a blatant constitutional violation. The second criterion has also been met: merger does not exceed what is necessary to eliminate the effect of the statutory scheme. Eight years under the State's method is proof that a stronger remedy is required. Certainly, it cannot be argued that TSU would be overwhelmingly black today if it had not been established as an institution for negroes. Merger is a drastic remedy, but the State's actions have been egregious examples of constitutional violations.

SUMMARY OF CONCLUSIONS

Nashville is a metropolitan center with a demonstrated need for a State institution of higher education offering a broad curriculum to both day and evening students. It now has two State universities which have in the past, are now, and will under the State's Long Range Plan, compete for students. This competition has lessened, to some extent, as a result of Court orders in this case, but

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[42]This Court is not ordering, nor has it ordered previously, the attainment of a specific percentage of blacks or whites at any institution.

it can be expected to increase if TSU follows the Plan and increases its evening offerings.

Desegregation at TSU, except for faculty, has been minimal and, to the extent that statistics indicate otherwise, due almost exclusively to the allocation of graduate education courses to it by order of the Court.

Prospects for effective cooperation between the Board of Trustees of the University of Tennessee and the State Board of Regents, insofar as it may affect the Nashville scene, are very poor. The political prowess of the University, so frequently evidenced in the past, serves to bolster its apparent resolve to offer only minimal cooperation in the efforts necessary to achieve the system of higher education in the Nashville area.

There is no reason why one university in the Nashville area could not effectively utilize both the home campus of TSU and the downtown campus now occupied by UT-N. The record shows that both are now operating some so-called off-campus centers, and witnesses supporting the Long Range Plan advocated an increase of this activity by TSU.

The two universities in Nashville, TSU and UT-N, must, in order to remedy the constitutional violations discussed herein, be merged under the governance of the State Board of Regents.

Progress by the defendants in the dismantling of a dual system of higher education in Tennessee, outside the Nashville area, has been slow, but the Court does not find that it has been so slow and devoid of good-faith effort as to show that it constitutes, at this time, a violation of constitutional requirements. The Long Range Plan, as it applies to such matters, appears to be a promising step forward and, under the careful supervision of the Monitoring Committee, should result in further progress.

The Court recognizes that the representation of blacks in the higher administrative positions in the State system and on the governing boards is minimal and should be increased. It rejects, however, the proposal that the Court should arbitrarily order the appointments of blacks to either the administrative positions or the governing boards, feeling that such action would be an improper exercise of the judicial function.

This opinion constitutes the findings of fact and conclusions of law required by Rule 52, Federal Rules of Civil Procedure.

An appropriate judgment will be submitted by counsel to the Court within twenty (20) days after the filing of this opinion. Such judgment will, of course, include the time limit of July 1, 1980, for the completion of all facets of the merger approved herein and will provide for retention of jurisdiction by the Court. In the event counsel cannot agree on a form of judgment, separate judgments may be submitted to the Court for consideration.

Frank Gray, Jr.

CHIEF JUDGE

In the United States District Court for the
Middle District of Tennessee
Nashville Division

Civil No. 5077

Rita Sanders Geier, et al.,

Plaintiffs,

United States of America,

Plaintiff-Intervenor,

Raymond Richardson, Jr., et al.,

Plaintiff-Intervenors,

vs.

Ray Blanton, et al.,

Defendants.

JUDGMENT

(Filed February 28, 1977)

The court issued a memorandum opinion in this action on January 31, 1977, pursuant to its consideration of the entire record herein including the evidence adduced during the month-long evidentiary hearing (September 20 to October 20, 1976) and the proposed findings of fact, or statement in lieu thereof, submitted by the parties. The opinion of January 31, 1977, constitutes the findings of fact and conclusions of law required by Rule 52, Federal Rules of Civil Procedure, and is incorporated herein by reference. Based on these findings of fact and conclusions of law and the entire record, the court Adjudges, Orders and Decrees as follows:

A. The University of Tennessee-Nashville (UTN) and Tennessee State University (TSU) shall be merged as a single institution under the governance of the State Board of Regents, such merger to be completed by July 1, 1980. The State Board of Regents will formulate a plan for the merger and its implementation and, in the development of such plan, shall have the assistance of an advisory committee consisting of six persons, three to be named by the President of TSU and three by the Chancellor of UT-N. In addition, all defendants herein are directed to provide necessary assistance to the Board of Regents in the planning and implementation of the merger. The plan for merger will be formulated and filed within seventy-five (75) days after the entry of this Judgment.

B. The Monitoring Committee set up under the Long Range Plan of defendants will oversee the continued desegregation of the predominantly white institutions of higher education, calling to task any institution which does not make steady progress.

C. Jurisdiction of this case is retained by the court for the enforcement of this Judgment.

/s/ FRANK GRAY, JR.
Chief Judge

In the United States District Court for the
Middle District of Tennessee
Nashville Division

Civil No. 5077

Rita Sanders Geier, et al.,

Plaintiffs,

United States of America,

Plaintiff-Intervenor,

Raymond Richardson, Jr., et al.,

Plaintiffs-Intervenor,

vs.

Ray Blanton, et al.,

Defendants.

ORDER

(Filed July 22, 1977)

Judgment was entered in this action on February 28, 1977. The Judgement provided, *inter alia*, that Tennessee State University and the University of Tennessee at Nashville be merged into one institution by July 1, 1980, the merged institution to be under the auspices of the State Board of Regents, which body was directed to formulate a plan for merger and to file the plan within seventy-five (75) days after the entry of this Judgment. The Board of Regents filed its plan on May 11, 1977.

Subsequent to the filing of the plan, plaintiffs-intervenor Ray Richardson, *et al.*, filed a document entitled "Objections of Plaintiff-Intervenors, Ray Richardson, Jr., et al., to Plan for the Merger of Tennessee State University and the University of Tennessee-Nashville Filed by the Defendant State Board of Regents and Motion for Further Relief." The court determined in an Order of June 17, 1977, that it was without authority to act upon the document by virtue of several notices of appeal from the final Judgment. Thereafter, plaintiffs-intervenor Richardson, *et al.*, filed a motion to reconsider the Order of June 17, 1977, which motion was accompanied by a memorandum and an amendment to the previous document, which based the request for further action upon Rule 62(c). Federal Rules of Civil Procedure.

Since the court's Order of June 17, 1977, two motions have been filed with the Clerk in addition to the motion for reconsideration filed by the plaintiffs-intervenor Richardson, *et al.* They are as follows: a "Motion to Correct Clerical Mistake in the Record" filed by the defendant University of Tennessee on June 30, 1977, and the "Response and Objections of the United States to Defendant's Plan for the Merger of Tennessee State University and the University of Tennessee Nashville" filed by plaintiff-intervenor United States on July 12, 1977. Responses have been filed by several parties.

With respect to the motion to reconsider, the court is of the opinion that it is not well taken. The plaintiffs-intervenor Richardson, *et al.*, are not, in the sense of 62(c), Federal Rules of Civil Procedure, requesting relief, pending appeal, from an order granting, dissolving, or denying an injunction, since, in the court's

opinion, the Judgment herein did not constitute an injunction.

As to the motion by the defendant, the University of Tennessee, to correct clerical errors and purportedly made under Rule 60(a), Federal Rules of Civil Procedure, the clerical error alleged consists only of the fact that the Clerk marked "Filed" the plan which had been ordered by the court. This motion is clearly without merit.

As stated *supra*, in the Order of June 17, 1977, this court determined that it had no authority to entertain the requests made by plaintiffs-intervenor Richardson, *et al.*, because proper notices of appeal had been filed by various parties, thus vesting jurisdiction over the case in the court of appeals. Nevertheless, all of the motions filed herein since the Judgment appear to be based in part upon a belief that the court should take further action in the case; specifically, that the court should hear or examine certain proposed objections to the plan submitted by the State Board of Regents before that plan can be put into effect.

Some of the objections, particularly some of those offered by Richardson, *et al.*, are clearly efforts to alter or amend the Judgment. The court has no power to so modify the Judgment, since notices of appeal were filed prior to these objections.

The remaining objections appear to assert that the plan submitted by the State Board of Regents violates the terms of the court's Judgment. Even if, as the United States contends, a district court has jurisdiction to enforce a judgment when a stay is not granted pending appeal, these objections are similarly without merit. The Judgment entered herein as stated, *supra*, ordered

the merger of the two institutions by July 1, 1980, under the auspices of the Board of Regents and directed the Board of Regents to submit a plan for the merger within seventy-five (75) days. The court purposely declined to specify the details of the merger. After determining that merger was the necessary remedy in this case, and ordering that it be done, the details were left to the educators of the Board of Regents. The plan submitted by the Board was timely filed and provides for the merger of the institutions by July 1, 1980. Consequently, it does not violate the Judgment. Absent a stay, the plan should be put into effect.

It is so Ordered.

/s/ FRANK GRAY, JR.
Chief Judge

No. 77-1622
No. 77-1624

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAYMOND RICHARDSON, JR., et al.
Intervening Plaintiffs-Appellants,

UNITED STATES OF AMERICA,
Intervening Plaintiff-Appellee,

v.

RAY BLANTON, Governor of the State of Tennessee, et al.,
Defendants-Appellees,

UNIVERSITY OF TENNESSEE, et al.,
Defendants-Appellees,

TENNESSEE HIGHER EDUCATION COMMISSION,
Defendant-Appellee,

STATE BOARD OF REGENTS,
Defendant-Appellee.

APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed April 13, 1979.

Before: LIVELY and ENGEL, Circuit Judges; and PECK, Senior Circuit Judge.

LIVELY, Circuit Judge. These consolidated appeals are from a judgment and order in litigation seeking desegregation of public higher education in Tennessee. The background and

a description of the litigation may be found in this court's opinion in *Geier* v. *University of Tennessee,* Nos. 77-1621, 77-1623 and 77-1625 decided and filed April 13, 1979. The plaintiffs-appellants Richardson et al. appeal from that portion of the district court's final judgment which approved the "long range plan" of the defendants insofar as it deals with desegregation of public institutions of higher education in Tennessee outside the metropolitan Nashville area. The same parties appeal from an order entered by the district court on July 22, 1977 in which the court denied motions to conduct hearings on objections to a plan for merger of two Nashville institutions, Tennessee State University (TSU) and the Nashville branch of the University of Tennessee (UT-N).

I

The order of July 22, 1977 is affirmed. As we pointed out in *Geier* v. *University of Tennessee, supra,* the district court held that the Nashville merger plan did not violate its judgment ordering the formulation of a plan. This conclusion has not been shown to be erroneous. Though the appeals in this and in *Geier* v. *University of Tennessee* were expedited, because of the congestion of our docket and the necessity to grant priority to many other appeals,[1] nearly two years have passed since the judgment was entered in this case. During that time the formulation and implementation of the plan of merger for TSU and UT-N have gone forward. Any objections to the merger plan may be presented to the district court following issuance of the mandates in this case and in *Geier* v. *University of Tennessee.*

Further, we do not consider the issue which the appellants have attempted to raise with respect to an alleged effort to oust the president of TSU. This matter was raised by an

[1] Over the years priorities have been established by Congress which require the advancement of certain categories of appeals. There are presently more than twenty priority categories.

affidavit of a non-party filed after entry of the judgment and notices of appeal and is not part of the record before us. The district court retained jurisdiction for the purpose of enforcing its previous orders in this case, and any claims that the defendants are failing to carry out those orders in good faith should be presented to the district court in the first instance.

II

In *Geier* v. *University of Tennessee* we held that the district court did not exceed its equitable power or abuse its discretion in ordering the merger of TSU and UT-N. In this appeal we are primarily concerned with the validity of the provisions for statewide desegregation contained in the long range plan. The appellants contend that the district court committed reversible error in failing to evaluate the specific goals and policies of the statewide features of the long range plan. They also argue that the plan dooms statewide desegregation by leaving its implementation in the hands of the defendants. In a supplemental brief and at oral argument the appellants urged the court to bring the U.S. Department of Health, Education and Welfare (HEW) into this case. It is not specified exactly to what extent HEW would be involved, except that its revised guidelines are urged upon us as creating minimum criteria for desegregation of public higher education.

A.

The district court found that the long range plan, as it applied statewide outside Nashville, "appears to be a promising step forward, and under careful supervision of the Monitoring Committee, should result in future progress." *Geier* v. *Blanton,* 427 F.Supp. 644, 661 (M.D. Tenn. 1977). The appellants argue that it is not necessary that we hold this finding clearly erroneous in order to reverse the judgment of the district court. They contend that if the district court had subjected the long range plan to a more "refined analysis" it would have concluded that much of the progress in desegrega-

tion claimed by the defendants was illusory and that the constitutional duty to dismantle the dual system of public higher education in Tennessee would not be achieved in a reasonable time under the long range plan. More specifically the appellants contend that "revised criteria" published by HEW should be applied in Tennessee. Though the revised criteria were not issued until a year after the judgment was entered in this case, they were published in the Federal Register (43 Fed. Reg. 6658) on February 15, 1978 and we take judicial notice of their contents.

B.

The long range plan, filed in July 1974, was prepared by a committee of representatives from the Board of Trustees of the University of Tennessee (UT Board), the Board of Regents, State University and Community College System of Tennessee (SBR) and the Tennessee Higher Education Commission (THEC). The committee was assisted by a bi-racial consultant panel of experts in education administration. It is stated in the introduction to the plan that the statewide goals "are statements of what ought to happen to bring about a fully desegregated system of public higher education in a situation where students will remain free to choose the institution they will attend, or even if they will choose to go to college at all." The introduction emphasizes that the goals are more than mere projections of past trends; the additional element is "evaluations of the impact of various actions which defendants can take to affect enrollment, and faculty employment to see if they are achievable . . ."

The plan sets out separate goals of black student enrollment to be attained by 1975 and 1980 for the community colleges, the universities under control of SBR and the University of Tennessee. The goals for the SBR universities are stated both with TSU included and excluded. These goals were summarized in a chart which also showed actual black enrollments for 1969 and 1973. The chart is reproduced here:

ACTUAL AND PROJECTED DEGREE CREDIT HEADCOUNT ENROLLMENT OF BLACK STUDENTS IN TENNESSEE'S PUBLIC COLLEGES AND UNIVERSITIES FOR SELECTED YEARS, 1969-80

	ACTUAL				PROJECTED			
	1969		1973		1975		1980	
	Black Enrollment	% of Total	Black Enrollment	% of Total	Black Enrollment	% of Total	Black Enrollment	% of Total
Community Colleges	398	7.44	2,387	16.0	3,515	19.1	5,744	23.2
Regents Universities								
Excluding TSU	2,354	5.44	3,446	6.8	4,286	8.0	5,534	9.6
Including TSU	6,853	14.34	7,581	13.8	8,597	14.8	9,624	15.4
Total Regents System								
Excluding TSU	2,752	6.03	5,833	8.08	7,801	10.9	11,278	13.7
Including TSU	7,251	13.99	9,968	14.2	12,112	15.8	15,358	17.6
University of Tenn.	1,117	3.2	2,200	5.1	3,151	6.7	4,975	9.2
Total Excluding TSU	3,869	4.62	8,033	7.1	10,952	9.2	16,253	11.9
Grand Total	8,368	9.47	12,168	10.74	15,263	12.4	20,333	14.4

If the goals are achieved the gap between black student enrollment and the black population of college age will be reduced from 5 per cent in 1973 to between 1.2 and 2.7 per cent in 1980. In the community colleges and the regents system, including TSU, the percentage of black students will exceed the proportion of the population who are black and of college age.

In preparing the plan the committee did not set a single goal, applicable to all institutions. The committee recognized that many of the institutions draw large numbers of students from nearby counties and that the black population of Tennessee is not evenly distributed throughout the State. The distribution of the black population of Tennessee was considered along with the "drawing area" of each school. It was felt that statewide desegregation would be achieved if each institution enrolled black students in approximate proportion to the black population of its service area.

The long range plan set statewide goals for black faculty and staff of 5 per cent by 1975 and 8.2 per cent by 1980. The committee noted that a recent survey of the American Council on Education had determined that only 3 per cent of the faculty and staff of American institutions of higher education were black. Again, different goals were assigned to the various institutions rather than a single goal applicable to all. These goals are summarized in the following chart, which was included in the plan:

	Actual						Projected					
	Fall 1969			Fall 1973			Fall 1975			Fall 1980		
	Total	Black	% Black	Total	Black	% Black	Total	Black	% Black	Total	Black	% Black
Comm. Col.	236	4.5	1.9	609.2	32.4	5.3	665.7	48.9	7.3	909.7	89.6	9.8
Reg. Univ.												
w/ TSU	2,220	253.3	11.4	2,671.8	231.7	8.7	2,939.1	274.7	9.3	3,152.4	328.3	10.4
W/out TSU	1,936	13.3	0.7	2,363.2	33.5	1.4	2,640.2	61.9	2.3	2,630.7	149.0	5.3
UT	2,033	20.5	1.0	2,598.0	51.1	2.0	2,724.0	92.0	3.4	2,975.0	164.0	5.5
Total												
W/TSU	4,489	278.3	6.2	5,879.0	315.2	5.7	6,328.8	415.6	6.6	7,037.1	581.9	8.2
W/out TSU	4,205	38.3	0.9	5,570.4	117.0	2.1	6,029.9	202.8	3.4	6,723.4	402.5	6.0

In addition to setting goals for the desegregation of student bodies, faculty and staff of the public institutions of higher learning, the long range plan establishes a monitoring system. A continuing desegregation committee (the monitoring committee) is charged with the following responsibilities:

> (1) to conduct an annual review of desegregation progress statewide and at each institution and report the results to the district court by November 15th of each year;
>
> (2) to make recommendations to the UT Board, SBR and THEC of needed additions or changes in the desegregation plan; and
>
> (3) to make further studies or collect additional information necessary to monitor the progress in achieving the desegregation goals specified in the plan.

The composition of the monitoring committee is bi-racial and consists of the chief executive and three members each of the UT Board, SBR and THEC.

C.

The appellants dispute the district court's finding that "the steady increase in black enrollment at the predominantly white institutions has continued." 427 F.Supp. at 650. The court made this finding on the basis of the first desegregation progress report which the monitoring committee filed in February 1976. It is the position of the appellants that the overall increase in the number of black students has not resulted in a significant decrease in the effects of the dual system. This is so, they say, because a disproportionate number of the black students are concentrated in a few institutions while white students are almost equally divided among community colleges, SBR universities and the various campuses of the University of Tennessee. Further, it is clear that the traditionally white graduate schools – particularly schools of law and medicine – remain overwhelmingly white.

With regard to desegregation of faculties the appellants again dispute the finding of the district court that there was "a small, but steady, increase" in the progression of black faculty between 1969 and 1975. 427 F.Supp. at 651. The appellants maintain that most of the traditionally white universities have few black faculty members and that the increases have taken place largely at a few institutions, most notably Shelby State Community College, a Memphis institution with a large black student body. It is also pointed out that several of the traditionally white universities have hired former TSU black faculty members, resulting in no net gain in the number of black faculty statewide. The appellants also contend that virtually no progress has been made in desegregating the administrative staffs of the various institutions and the non-institutional administrative personnel of the two governing boards and THEC.

In addition to disputing the finding of past progress the appellants sharply criticize the plans for future desegregation. The approach is labeled "non-comprehensive and non-systematised" and the goals are said to be "too low and too distant." One complaint is that there is no centralized body with enforcement powers and that the monitoring committee has no real power, no staff and a minimal budget. The appellants also argue that the plan is deficient for lack of a commitment to scholarship funds for black students and for lack of a requirement that the institutions report to the court on their retention of black students.

The appellants say that the district court would have discovered these defects if it had undertaken to evaluate the specific goals and policies rather than making a generalized finding that the long range plan is adequate. It is their position that the district court did not carefully consider all the evidence before it and that it abdicated its responsibility

to supervise desegregation by delegating this function to the monitoring committee.

D.

The United States did not appeal. It notes in its brief as an appellee that the percentages of black student enrollment at all state institutions more than doubled between 1969 and 1975 and urges affirmance of the judgment insofar as it holds that desegregation of students is progressing at a constitutionally acceptable rate. The United States also concludes that the student goals for each institution under the long range plan are based on valid formulas and are acceptable, and agrees with the finding of the district court that the monitoring committee can supervise implementation of the plan adequately by exercising careful supervision.

The United States questions the judgment in one respect only. It urges us to vacate that portion of the judgment finding the long range goals for faculty desegregation to be adequate. It argues that the district court failed to make findings on undisputed evidence that a disparity exists between salaries paid to black and white faculty members at all traditionally white institutions. Since the defendants contend that Tennessee was in a difficult competitive situation in attempting to attract qualified black faculty members, it is argued that lower salaries paid to black teachers may account for this difficulty in hiring. The United States also concludes that the district court did not consider the fact that a disproportionate number of black faculty are employed at community colleges and that much of the improvement in desegregation of faculties at traditionally white universities has resulted from the movement of teachers from TSU to other institutions.

E.

The State appellees seek to support the district court's judgment in several ways. They point out that the long range plan directs employment of a number of strategies to achieve desegregation in addition to setting numerical goals. One result of this requirment is that an affirmative action policy was adopted by SBR and each of its institutions was directed to do the same. The progress report contains evidence of genuine efforts by all institutions to achieve the goal of statewide desegregation, they assert.

More specifically the appellees rely on the fact, as shown in the progress report, that the percentage of black freshmen enrolled at all institutions in the fall of 1975 exceeded the percentage of black persons in the Tennessee population. It is also argued that steady progress has continued in the effort to increase the number and proportion of black faculty members throughout the public higher education system. The claim of appellants and the United States that there was undisputed evidence of salary disparities which the district court failed to consider is challenged. The witness who testified to this effect admitted on cross-examination that in making his analysis of comparative salaries he did not consider time in academic rank, performance grading, publication and research activities and the places from which advance degrees were obtained. The appellees take the position that the district court was permitted to weigh this testimony as any other, and was not required to accept the conclusions of the witness.

III

The district court's approach to the statewide aspects of the long range plan must be viewed in proper perspective. From the beginning of this litigation the district court looked upon the situation in Nashville involving TSU and UT-N as "the heart" of the problem of segregated public higher education in Tennessee. The court and the original plaintiffs

proceeded on the premise that the essential first step in achieving a unitary system must occur in Nashville. *Sanders* v. *Ellington*, 288 F.Supp. 937, 942-43 (M.D. Tenn. 1968). There had been virtually no progress by 1968 in desegregating TSU, and the expansion of UT-N ultimately was found to be a deterrent to any hope of attracting a white presence to TSU. *Geier* v. *Blanton, supra*, 427 F.Supp. at 652-53. At the same time that TSU remained overwhelmingly black many of the traditionally white institutions were making some progress in desegregating their faculties and student bodies. Thus, while the rest of the system was not ignored, the focus of the court was clearly on Nashville. Nevertheless, when a situation outside Nashville which threatened the progress of desegregation was brought to the court's attention, it acted with dispatch. On June 20, 1973 the district court, in the present case on the motion of appellants herein, enjoined construction of a community college campus in a predominantly white section of Shelby County and directed that a mid-town Memphis campus be developed first. The court found that the prospects were good for a reasonable racial balance in the student body at the mid-town site whereas a school at the old county penal farm would be overwhelmingly white.

The approach of the district court to this complicated case was to require steady progress statewide while concentrating on the areas where local conditions or actions presented identifiable obstacles to the required dismantling of Tennessee's dual system of public higher education. This was a reasonable procedure.

In determining that the long range plan was constitutionally adequate Judge Gray had before him the desegregation progress report filed February 15, 1976 and the minutes of the monitoring committee as well as the testimony and documentary evidence received at the trial. The progress report disclosed continued progress toward a more balanced distibu-

tion of black students. Approximately 60 per cent of the increase in black students from 1974 to 1975 was recorded at institutions other than TSU and Shelby State Community College which had the largest concentrations of black students. The progress report and monitoring committee minutes showed that the long range plan was not static. The goals ultimately adopted for black enrollment in the fall of 1975 exceeded those of the original plan as the result of adoption of "revised equal access goals."

Less success was reported in efforts to desegregate faculties and staff. The progress report noted a better distribution of black faculty from 1974 to 1975, but concluded that it is difficult to formulate realistic goals for black faculty and staff because of the intense national competition for a relatively small number of qualified black candidates. In this area "action steps" were adopted which included a program to aid faculty members lacking terminal degrees to complete their studies.

The progress report recognized that the increased numbers of black freshmen would require greater attention to problems of retention if the purposes of the plan were to be achieved. The report acknowledged that the best results were being achieved at the undergraduate level, but noted some progress in desegregating graduate schools other than law schools. The institutions under the SBR made the most consistent progress, achieving the interim goals for that system in all areas – student, faculty, institutional and non-institutional staff. Some progress in all areas was noted in the University of Tennessee system and the report pointed out that the desegregation goals for the UT system had been revised upward. The report concluded with a statement of the requirement that a "desegregation impact assessment" be made before changes could be made by a governing board in the following areas: (a) academic programs; (b) policies or requirements related to admissions, retention or graduation; (c) student financial

assistance programs; (d) decisions involving the construction, closing or combining campuses and establishment of new institutions and cooperative programs.

IV

In *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 417-18 (1977), the Supreme Court set forth the role of a court of appeals in reviewing the judgment of a district court in a desegregation case as follows:

> On appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed. Rule Civ. Proc. 52(a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors.

It is apparent from our study of the record that the findings of fact related to the statewide progress toward desegregation of public higher education in Tennessee are not clearly erroneous. The appellants assert error in the alleged failure of the district court to consider all the evidence before it. The mere fact that particular evidence is not mentioned in an opinion does not mean that it was not considered.[2] It was the duty of the District Judge as trier of the facts to weigh the evidence. We have no authority to direct that certain evidence be accepted and other evidence rejected, and no basis for assuming that competent evidence was not considered.

[2] See Advisory Committee's Note of 1946 to Rule 52(a):
> But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts.

Quoted in 5A J. Moore, Federal Practice ¶ 52.01(5), at 2607 (2d ed. 1977).

A.

The appellants charge that the constitutional command to dismantle the dual system immediately will not be satisfied by adherence to the long range plan. Cf. *Green* v. *County School Board*, 391 U.S. 430 (1968). The district court fully recognized the duty to require "a plan that promises realistically to work now." *Id.* at 439. In its 1972 opinion, *Geier* v. *Dunn*, 337 F.Supp. 573, the court discussed the fundamental differences in public higher education and public elementary and secondary education which require different approaches to dismantling dual systems:

> Thus, regarding the disestablishment of a dual system of higher education, a court cannot – at least in the usual situation – order the transfer of faculty from one institution to another, order the transfer of students from one institution to another, or actually set the curricula at various such institutions. Over and above the question of such a court's actual *power* to do so, such relief would not be administratively feasible, because there would be no way to ensure that it actually worked: no court can "order" a student to confine himself to one college or university instead of another, for, unlike the situation in a system of elementary or secondary education, such persons are free to leave and go elsewhere as they wish. The lesson is that, when it comes to the disestablishment of a dual system of higher education, a federal court *cannot* do what it might do in the realm of lower and secondary education: what works in one system will not work in another. Yet this is so as a practical matter, and not as a result either of there being less of a duty owed by a state to dismantle a dual system of higher education or of a lack of power – at least in a jurisdictional sense – on the part of a federal court to remedy such a situation. The limiting factor, from the court's point of view, is "What will work?"
>
> 337 F.Supp. at 579. (footnotes omitted).

We believe that the quoted language demonstrates a faithful adherence by the district court to the constitutional requirements. A careful weighing of many factors led the court to conclude that the long range plan offered the most realistic promise for desegregation of public higher education within a reasonable time. Instant desegregation is not achievable and has not been required. As we point out in our discussion of the HEW revised criteria, *infra*, "sequential implementation" over a period not to exceed five years is an accepted practice.

Though the district court approved the principle of phased steps toward statewide desegregation, it did not hesitate to require immediate action where local conditions required it. Thus, once the court concluded that the actions of UT-N were hindering the dismantling of segregation in the Nashville area, it applied the "radical" remedy of a court-ordered merger. When the proposed location for the campus of a community college in Shelby County threatened to increase rather than decrease segregation the court enjoined construction at that site. The district court demonstrated its determination to implement the constitutional demand for "whatever steps are necessary" (*Green*) to achieve desegregation by taking prompt and decisive action in these instances.

We find no error in the district court's conclusion that desegregation was progressing at a steady and acceptable rate outside Nashville and that the long range plan gave promise of continued progress. The court retained jurisdiction to implement its judgment and orders. If this progress should halt or seriously falter the court will be in position to impose new requirements.

B.

The appellants also contend that the district court committed legal error in "abdicating" its duty to supervise desegregation by placing this responsibility on the monitoring

committee. In *E.E.O.C.* v. *Detroit Edison Co.*, 515 F.2d 301, 317 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977), we held that a district court could not delegate to a citizen committee its duty to resolve disputes arising under its decree. The functions of the monitoring committee established by the long range plan are to review and report on progress, to make recommendations for changes and to make such other studies as may be necessary to monitor the program of desegregation. The district court clearly expected valuable assistance from it but there was no delegation of any judicial responsibilities to this committee. The district court retained its full authority to control the program of desegregation, looking to the monitoring committee for reports and recommendations. This was not an abdication of the court's duty.

C.

The appellants further argue that it was error to approve a plan which dealt with the various institutions individually rather than taking a statewide approach as prescribed in *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). *Adams* was an action brought pursuant to Title VI of the Civil Rights Act of 1964 to compel the Secretary of HEW to require desegregation of public higher education in a number of southern states. The decision in *Adams* does not enunciate the rule that a plan which approaches a statewide problem of desegregation fails to satisfy constitutional standards by treating the several institutions individually. The constitutional requirement is to dismantle the dual system as quickly as possible, using methods which may be realistically expected to work. No institution was excluded from the Tennessee long range plan and it is statewide in scope. There is no merit to this argument.

V

After briefing of this appeal was completed the appellants filed a motion for leave to file a supplemental brief. The

proposed brief and several exhibits were filed with the motion. This motion was passed to the merits of the appeal and is now granted. The single proposition argued in the supplemental brief is, "The HEW Revised Criteria and Progress Report Indicate that the Lower Court Erred in Implementation of the Nashville Merger and Statewide Desegregation." The revised HEW criteria are those issued on February 15, 1978 and the progress report referred to is the annual report required by the long range plan dated February 16, 1978. The district court has not had an opportunity to consider this argument and we do not reach it. Though we take judicial notice of the revised HEW criteria, neither they nor the February 16, 1978 progress report are part of the record on appeal. Our examination of the revised HEW criteria discloses many similarities and many differences between them and the long range plan. The HEW criteria obviously deal with long-term objectives. The criteria require timetables for the *sequential implementation* of necessary actions in order to achieve stated goals "as soon as possible, but not later than within five years . . . ." 43 Fed. Reg. at 6661. The goals which are required are referred to as "benchmarks." A benchmark is a standard by which to measure future achievement. An acceptable plan is described as one which assures that students will be attracted to each institution on the basis of educational programs and opportunities uninhibited by past practices of segregation. The long range plan appears to contain many of the elements of an acceptable plan under the HEW criteria. It is interesting to note that Judge Gray's statement of factors requiring special consideration in developing a plan for desegregation in higher education (*Geier* v. *Ellington*, 288 F.Supp. at 943) is quoted in the statement of "legal and educational principles" in the preamble to the criteria. 43 Fed. Reg. at 6659.

Upon issuance of the mandate from this court the parties will be free to seek a hearing in the district court on any

motions related to developments since the judgment was entered in this case. Matters related to the February 16, 1978 progress report and the revised HEW criteria should be presented in this manner. It would lengthen this opinion unduly to discuss in detail each assignment of error. On the record before this court we hold that the findings of fact of the district court are supported by substantial evidence and no errors of law requiring reversal were committed. As has been emphasized repeatedly herein, the district court has retained jurisdiction to oversee implementation of the long range plan. If further refinements of the plan or new devices are required to reach the condition which the Constitution requires, nothing contained in this opinion will hinder the district court from taking all steps reasonably calculated to achieve that goal.

The judgment of the district court is affirmed. No costs are allowed.

No. 77-1621
No. 77-1623
No. 77-1625

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RITA SANDERS GEIER, et al.,
Plaintiffs-Appellees,

UNITED STATES OF AMERICA,
Intervening Plaintiff-Appellee,

RAYMOND RICHARDSON, JR., et al.,
Intervening Plaintiffs-Appellees,

v.

UNIVERSITY OF TENNESSEE, et al.,
Defendants-Appellants,

TENNESSEE HIGHER EDUCATION COMMISSION,
Defendant-Appellant,

STATE BOARD OF REGENTS,
Defendant-Appellee.

APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed April 13, 1979.

Before: LIVELY and ENGEL, Circuit Judges; and PECK, Senior Circuit Judge.

LIVELY, Circuit Judge, delivered the opinion of the Court, in which PECK, Senior Circuit Judge, joined. ENGEL, Circuit Judge, (pp. 31-42) delivered a separate dissenting opinion.

LIVELY, Circuit Judge. The issues in this appeal relate to court-ordered desegregation of public institutions of higher education in Tennessee. The appellants are the University of Tennessee, its president and board of trustees (hereafter referred to collectively as UT Board) and the Tennessee Higher Education Commission (hereafter THEC), all defendants below. The appellees are the original plaintiffs, Rita Sanders Geier et al., the United States of America and Raymond Richardson, Jr. et al., intervening plaintiffs, and the State Board of Regents (hereafter SBR), a defendant below. This appeal is primarily concerned with orders of the district court directing that two public institutions of higher education in Nashville, University of Tennessee at Nashville, (UT-N) and Tennessee State University (TSU) be merged into a single institution by July 1, 1980, under the governing authority of SBR.

HISTORICAL BACKGROUND

Historically public higher education in Tennessee was segregated by law. The University of Tennessee was chartered in 1807 and was operated exclusively for white students from at least 1870 until 1960.[1] TSU was founded in 1912 for the express purpose of educating black students. It was the only public institution of higher education in Tennessee which accepted black students prior to 1960. Over a period of years a number of regional state colleges and universities were established, all for the education of white students. In 1947

[1] Compulsory racial segregation in all Tennessee institutions of higher learning was first mandated by Article 11, § 12 of the Tennessee Constitution of 1870. In 1901 Tennessee became the first state to enact criminal statutes requiring racial segregation in all public and private colleges. 49 Tenn. Code Ann. §§ 3701-3 [Unconstitutional].

the University of Tennessee established a "center" at Nashville for the purpose of providing evening instruction for part-time students who worked in state government, business and industry in Nashville. As part of the University of Tennessee system, it was established as an all-white institution. At the time this suit was filed UT-N was a two-year extension college which granted no degrees and taught no advance courses. At that time TSU remained virtually all black. UT-N is located in downtown Nashville less than five miles from the campus of TSU.

Control of the public institutions of higher education in Tennessee has not been under a single governing body in the recent past. The University of Tennessee has always been governed by its own board. For many years TSU was governed by the State Board of Education. In 1972 the Tennessee Legislature created the State Board of Regents which is the governing authority for regional colleges and universities and the community colleges of Tennessee. Governance of TSU was transferred from the State Board of Education to the Board of Regents. TSU differs from all of the other institutions governed by SBR in that it is a land grant college. Further, all of the institutions under the Board of Regents except TSU and Memphis State are regional colleges or universities. TSU has traditionally drawn students from throughout the State and from outside Tennessee.

In 1967 the Legislature created the Tennessee Higher Education Commission. Although THEC has some authority over all public institutions of higher learning in Tennessee, insofar as this record is concerned, there is no evidence that prior to being made a party to this suit it ever used its authority in any way to facilitate desegregation in these institutions.

PROCEEDINGS IN THE DISTRICT COURT

This litigation began in 1968 when the appellee Geier (nee Sanders) sought an injunction to prohibit the contemplated expansion of UT-N, to prevent the maintenance of unequal facilities at TSU and white institutions of higher learning and to prevent the maintenance of segregated institutions by action or inaction of the defendants. In addition to the parties to this appeal, the governor of Tennessee and various state officials were named defendants. The claims for relief were based on the assertion that it was unlawful for Tennessee to continue to operate a dual system of public higher education and that the proposed expansion of UT-N would solidify and perpetuate segregation in the public colleges and universities of Tennessee. The intervening complaint of the United States sought much broader relief. Asserting that the maintenance of one black university and a number of white universities by the State of Tennessee violated the Equal Protection Clause of the Fourteenth Amendment and that students at TSU received inferior educational opportunities, the intervenor sought a court order requiring the State to dismantle the dual system and equalize educational opportunities at all public institutions of higher education throughout the State. The United States specifically sought an order that the defendants be required to submit a plan of desegregation and that expansion of UT-N be enjoined.

The defendants admitted in their answers that segregation had not been eliminated in the public institutions of higher education in Tennessee, but alleged that progress was being made. They specifically denied that the proposed expansion of UT-N would strengthen or perpetuate segregation.

A. The 1969 Order and Opinion

Following a hearing the district court issued an order on August 22, 1968 denying an injunction to prohibit expansion of UT-N and directing the defendants to prepare and submit

to the court a plan for effective desegregation of public higher education in Tennessee. On August 23, 1968 the district court filed an opinion which is reported as *Sanders* v. *Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968). Describing the history of public educational opportunities for Negroes in Tennessee as "not a pretty one," the court found that racial requirements for admission to Tennessee's public colleges and universities had been formally abolished and that all were operating under an "open-door policy." However, the court further found that "the dual system of education created originally by law has not been effectively dismantled." *Id.* at 940. In denying an injunction against expansion of UT-N the district court specifically found that there was nothing in the record to indicate that the University of Tennessee had any intention of making its Nashville center a degree-granting day institution. On this basis the court found that the proposed expansion of UT-N would not necessarily perpetuate a dual system of public higher education.

One of the primary arguments of the state defendants before the district court was that they had discharged their constitutional duty to desegregate higher education in Tennessee by removing all racial requirements for admission to the various institutions and adopting an "open-door" admissions policy. This argument relied primarily on the opinion of Chief Judge Frank M. Johnson, Jr. in the three-judge case of *Alabama State Teachers Association* v. *Alabama Public School and College Authority* (hereafter referred to as *ASTA*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969). In *ASTA* the court declined to enjoin construction of a four-year, degree-granting extension of Auburn University in Montgomery where the state operated the all-black Alabama State College. In *ASTA* the court noted the fundamental differences between compulsory free education at elementary and secondary levels and higher education which is elective and requires payments by students, and held that the "basic requirement" of the affirmative duty to dismantle

a dual system of higher education is met when good faith is exercised in dealing with admissions, faculty and staff. 289 F.Supp. at 789-90.

In his opinion Judge Gray stated specifically that he was not basing his denial of an injunction against expansion of UT-N on the holding in *ASTA*. Citing holdings of the Supreme Court of the United States, particularly *Green* v. *County School Board*, 391 U.S. 430 (1968), Judge Gray found that the open admissions policy which the State of Tennessee had instituted did not discharge the affirmative duty imposed by the Fourteenth Amendment to dismantle a dual system of higher education in a situation where that policy had produced "no genuine progress toward desegregation and no genuine prospect of progress." 288 F.Supp. at 942. The court then ordered the state defendants to submit a plan "designed to effect such desegregation of the higher educational institutions of Tennessee, with particular attention to Tennessee A & I State University [the former name of TSU] as to indicate the dismantling of the dual system now existing." *Id.* The district court found it clear from the record "that the failure to make A & I a viable, desegregated institution in the near future is going to lead to its continued deterioration as an institution of higher learning." *Id.* at 943.

In obedience to the court's order the state defendants filed a plan on April 1, 1969 which was little more than a recommendation for a series of actions, described in very general terms. This plan treated the identifiably white institutions and TSU separately. It proposed that the white schools attempt to increase the black presence on their campuses by recruiting at identifiably black high schools, setting aside "certain amounts" for aid to black students and establishing programs which encouraged participation of black people on their campuses. Increased recruitment of black faculty members was also recommended. It was suggested that TSU seek white high school students with an integrated recruit-

ing team, that it institute programs for high school pupils of both races and recruit white faculty members, and that it improve its campus and develop programs which would appeal to students of both races.

The plan also proposed that there be joint academic programs between TSU and UT-N, including joint course planning and faculty appointments, easy access and transfer of credits and joint degree programs. After consideration, the district court entered an order in which it neither approved nor disapproved the plan because it lacked specificity. The court directed that the defendants report on each recommendation in the plan, showing development of more specific plans in the various areas and disclosing what progress was being made.

B. The 1972 Opinion

After receiving several reports the district court concluded that, while the state defendants were proceeding at a constitutionally permissible rate of speed in dismantling the dual system on a statewide basis, the 1969 plan was not effectively dealing with the Nashville problem. The memorandum opinion of the court is published as *Geier* v. *Dunn*, 337 F. Supp. 573 (M.D. Tenn. 1972). Finding few changes at TSU the court specifically held that a dual system of higher education which originated in the state law requiring separation of the races is not dismantled as long as one overwhelmingly black state institution remains surrounded by predominantly white state institutions. Judge Gray concluded that the reports which he had received indicated that the approach to the problem advocated in the original state plan was not working and showed no prospect of working. He therefore ordered that a new plan be formulated which would specifically involve allocation of programs to TSU which would guarantee a substantial "white presence" at that institution and would desegregate its faculty. The defendants were also directed to explore and report on the feasibility of merger of TSU and UT-N among other possibilities. *Id.* at 581.

In the course of his opinion Judge Gray discussed *ASTA* and the later opinion of a three-judge court in *Norris* v. *State Council of Higher Education for Virginia* (hereafter *Norris*), 327 F.Supp. 1368 (E.D. Va.), *aff'd per curiam sub nom Board of Visitors of the College of William & Mary in Virginia* v. *Norris*, 404 U.S. 907 (1971). In *Norris* the district court enjoined the "escalation" of predominantly white Richard Bland College in the same community where traditionally black Virginia State College had been operated since 1882. Although the *Norris* court sought to distinguish *ASTA*, its basic holding was that the duty of a state to dismantle a dual system of higher education resulting from previous requirements for separation of the races is the same as the duty to dismantle a dual system of public elementary and secondary education. As Judge Butzner wrote in *Norris*, the means of eliminating discrimination are necessarily different when dealing with different levels of education, but "the State's duty is as exacting" in one as in the other. 327 F.Supp. at 1373. In analyzing *ASTA* and *Norris* Judge Gray found both to be consistent with teachings of *Swann* v. *Board of Education*, 402 U.S. 1 (1971), that the scope of an equity court's power is broad and flexible once a violation of the Constitution has been found and that the court must engage in a balancing of the interests of individuals and those of society, with the nature of the violation determining the scope of the remedy. Applying these principles the district court in the present case recognized the significant interests of the State in setting its educational policies and concluded that Tennessee had met the *basic requirement* of the Constitution in establishing open admissions accompanied by good faith recruiting efforts. However, the court specifically found that the adoption of this basic requirement had not resulted in significant changes at TSU and that something further was required.

C. Proceedings Following 1972 Opinion

The defendants then filed a plan with separate proposals for desegregating the faculty and student body at TSU. This plan called for appointment of white faculty members to fill vacancies at TSU unless there was a superior black applicant, the addition of ten non-black new faculty members at TSU to teach in areas of particular interest to white students and a faculty exchange program. The plan also proposed an increase in student aid and that a portion of it be earmarked for the recruitment of white students. In addition other efforts aimed at the recruitment of white students were proposed in general terms. Specifically, the plan called for improvement of the TSU campus, including construction of a new library and business building. The plan also provided for the transfer of a social work program to TSU physically, but did not remove it from the academic structure of UT-N. The court ordered that this plan be implemented immediately as satisfaction of the "initial minimum duty" of the defendants.

Thereafter the district court received several reports, none of which indicated any significant success in Nashville. Though UT-N was attracting more black students than previously, there was little improvement in the number of white students studying on campus at TSU. The UT Board and THEC tended to blame this situation on alleged inferiority of TSU and they suggested a task force to recommend improvements at that institution. TSU disagreed with much of what was contained in these reports, contending that UT-N offered direct competition for white students in the Nashville area who were most likely to provide future growth for TSU. The THEC report of July 15, 1972 concluded that the merger of TSU and UT-N was not feasible at that time, but acknowledged that merger might be required in the future. TSU filed a response to the plan put forward by the state defendants in which it strongly urged merger as the only feasible means of dismantling the dual system and specifically requested that TSU be given exclusive control of all public higher education in metropolitan Nashville. It was proposed that UT-N would eventually become the evening center of TSU.

On February 23, 1973 the district court granted leave to the plaintiffs Richardson et al. to intervene. The complaint of the intervening plaintiffs addressed the issues somewhat differently than the complaints of both the original plaintiffs and the United States. It sought an injunction barring discrimination against black students, faculty and staff in the adoption and implementation of a desegregation plan, criticized the current plan for requiring an increase in white faculty at TSU without a concomitant increase in black faculty members in the University of Tennessee system and for increasing aid to white students attending TSU without taking steps to increase access of black students to higher education generally. The intervening complaint expressed a concern that plans formulated by the defendants would result in a decrease in the influence and strength of TSU without providing increased opportunities to black students for higher education at the previously all-white institutions. It particularly opposed any plan which would result in TSU being placed under the control of "white persons who are antagonistic to black aspirations." The complaint sought an order directing the adoption and implementation of a plan which would effectively dismantle the dual system of public higher education.

A report filed by the defendants on February 14, 1974 showed steady, if slow, progress in increasing the enrollment of black students and the employment of black faculty members at the formerly all-white institutions throughout the state. Though some desegregation of the faculty and student body at TSU was reported, the court found that progress toward dismantling the dual system in Nashville had been minimal under the 1969 plan and the defendants were ordered to produce a new interim plan. Meanwhile

the court did order exclusive allocation to TSU of graduate studies in education in an effort to determine the effectiveness of such an approach. On July 5, 1974 the court entered an order generally approving an interim plan produced by THEC. On July 31, 1974 both the UT Board defendants and the intervening plaintiffs Richardson et al. filed proposed plans. The intervening plaintiffs proposed merger of UT-N into TSU. Their plan also required the appointment of black administrators at executive levels throughout the higher education system of Tennessee and set much higher goals for employment of black faculty members at various institutions than were set in any of the other proposals. The proposal of the defendants which they denominated a "Long Range Plan" set forth goals and implementation procedures for additional desegregation of the various institutions. This plan was jointly developed by the UT Board, THEC and SBR.

The United States filed a detailed response and objections to the long range plan in which it took the position that the plan offered no prospect for achieving meaningful desegregation in Nashville. The United States urged the court to adopt a program requiring merger of UT-N into TSU by phasing out UT-N and transferring all programs to TSU as the most promising method of achieving desegregation in the Nashville area. Eventually the downtown facilities of UT-N would be used as a branch of TSU for training state and local government employees. The United States approved the concept of a monitoring committee as proposed in the defendants' long range plan. At about the time the United States filed its response and objections the original plaintiffs filed a statement urging that the only meaningful way to deal with the Nashville situation would be through merger of TSU and UT-N, with TSU as the surviving institution.

Thereafter, on May 20, 1975 and February 15, 1976 reports were made on implementation of the long range desegregation plan. The progress report of February 15, 1976

was prepared at the request of the monitoring committee and was filed by it with the court on May 13, 1976. The February 15, 1976 report disclosed increases in black enrollment state-wide, including TSU, from 11.9 to 12.6 per cent from 1974 to 1975 and an increase in the white enrollment at TSU from 10 to 12.2 per cent in the same period. Little progress was reported in the desegregation of faculty and administrators in the Nashville area and details were given of cooperative and joint educational programs which were being undertaken at UT-N and TSU. On the basis of this latest report the defendants filed a motion for summary judgment, arguing that the duty to dismantle the dual system of public higher education in Tennessee had been fulfilled. The court noted several "instances of little or no progress" and denied the motion for summary judgment. Instead, the case was set for trial. Evidence was heard over a period of approximately one month involving 20 trial days.

D. The Judgment Appealed from and the 1977 Opinion

Following the hearing the district court entered a judgment directing that merger of UT-N and TSU be completed within three years from July 1, 1977. In his opinion accompanying this judgment, reported as *Geier* v. *Blanton*, 427 F.Supp. 644 (M.D. Tenn. 1977), Judge Gray reviewed in detail the history of the litigation. He noted the failure of the institutions to reach agreement on joint and cooperative program allocation and found that the only significant results had been achieved in the area of graduate studies in education which the court had directed be allocated exclusively to TSU. No cooperative programs had been attempted at that time and the exclusive programs which were assigned on the basis of time of day taught (daytime at TSU and after 4:00 p.m. at UT-N) remained overwhelmingly or predominantly reflective of the racial makeup of the campus where they were taught. The court found that the joint

degree program in general engineering was an admitted failure and the prospects were poor for success of a joint masters program in public administration. The court also remarked on the fact that a significant part of the increase in white enrollment at TSU was in off-campus programs and that actual white enrollment on the campus at TSU was only 7 per cent.

In assessing the hope for future improvements in the Nashville area under the long range plan as "dim," the court cited the inability of the governing boards to agree on the proper course of action and the reluctance of the "politically powerful" University of Tennessee to take significant steps to eradicate dualism. 427 F.Supp. at 656. The court then concluded "at this time the only reasonable alternative is the merger of TSU and UT-N into a single institution under a single governing board." *Id.* at 657. The court also determined that the merged institutions should be governed by SBR since TSU would be eliminated if put under the University of Tennessee Board. The court noted further that SBR has control of other institutions in the middle Tennessee area and will be in the best position to control future competition among them.

With respect to the situation outside the Nashville area the district court found continuing steady progress in desegregating formerly all-white institutions, although it noted the difficulties being experienced in recruiting black faculty members and administrators. The court approved the long range plan insofar as it relates to schools outside the Nashville area and found that it was not necessary to evaluate all of the specific goals set forth in the plan.

In addition to ordering merger the judgment provided for establishment of an advisory committee consisting of three persons representing each of the merged institutions to assist in the preparation and implementation of a plan of merger which was ordered filed within 75 days. The judgment also continued the monitoring committee under the long range

plan of the defendants to oversee the continued desegregation of institutions outside Nashville. The court specifically found that there was no constitutional violation at that time in the system statewide, considering the slow but steady progress being made in desegregating the various institutions and the fact that the long range plan appeared to promise further progress. The court admonished that implementation of the long range plan should be under the careful supervision of the monitoring committee.

Notices of appeal were filed by the UT Board and the intervening plaintiffs Richardson et al. THEC filed a notice of appeal from that portion of the judgment which ordered merger of the two institutions in Nashville. Neither the original plaintiffs nor the intervening plaintiff, the United States, appealed. Neither SBR nor the other state defendants (excepting the UT Board and THEC) appealed. The appeal of the plaintiffs-intervenors Richardson et al. is primarily concerned with the long range plan outside the Nashville area and will be dealt with in a separate opinion.

E. Post-Judgment Proceedings in the District Court

As directed in the judgment SBR filed a plan of merger on May 11, 1977. On June 13, 1977 the intervening plaintiffs Richardson et al. filed detailed objections and the UT Board filed a motion to strike the plan of merger. The intervenor United States filed objections setting forth the "inadequacies of the plan" and stating that it was "a plan for planning merger since it lacked the required specificity to be considered a plan of merger." After first holding that it had no jurisdiction because notices of appeal had been filed, on July 22, 1977 the district court overruled all motions and held that the plan submitted by SBR does not violate the judgment and should be put into effect unless stayed. Both the intervening plaintiffs Richardson et al. and the UT Board filed notices of appeal from this order. Subsequently the

district court denied a motion for stay and upon application to this court a stay was also denied.

F. Description of the Plan of Merger

Though it may lack specific details with respect to the exact steps to be taken in each area of implementation and the precise timing of such steps, the SBR plan presents a comprehensive framework for implementation of merger. It provides detailed guidelines and directives in the areas of curriculum and degree requirements, employment rights of faculty and staff of both institutions including grievance procedures, provision for participation in student government by former UT-N students, and guarantees to former UT-N faculty of the right to participate in the faculty senate and standing committees. It also outlines procedures for purchasing and leasing equipment and library materials. The plan defines the role of the expanded TSU in terms of a broad range of programs suitable to an urban university and provides for operation of the expanded TSU 14 hours per day and full utilization of all facilities.

The plan provides for an implementation committee made up of members from the SBR, UT Board and THEC, a majority of whom may be black. This committee is to report its activities both to SBR and the monitoring committee each quarter and the chancellor of SBR is to report annually to the district court. A bi-racial advisory committee of ten members is to be appointed by the governor to assist the implementation committee. That committee will work through subcommittees having representatives of the faculty, staff and students of both institutions. The plan provides for nine academic subcommittees, three administrative subcommittees and a subcommittee for student affairs. Detailed timetables are set forth for each of the subcommittees, with all beginning work on July 1, 1977 and full implementation contemplated in July or August 1979. The plan also provides

that headquarters of the expanded TSU will be on its present campus and that a vice-president for public service and administration will be the highest officer stationed on the former UT-N downtown campus. A dean for continuing education and evening programs will also maintain an office on the downtown campus, and evening programs are to be continued and expanded as required.

THE CONSTITUTIONAL VIOLATION

A. The Vestiges of State-Imposed Segregation Remained

Though they differ somewhat in emphasis, the essential position of both appellants is the same. While conceding that Tennessee operated a state-imposed dual system of public higher education prior to 1960, the UT Board and THEC contend that the State fulfilled its constitutional obligation to establish a unitary system when it instituted an "open-door" admissions policy. They argue that the present predominantly black enrollment at TSU has resulted from the exercise of free choice by students rather than from any *current* unconstitutional actions of the State. The mere fact that TSU remains predominantly black, they contend, is not evidence of a violation. Thus since there is no present violation, there is no authority for the district court to impose a remedy. Basic to their argument is the contention that the district court made fatally inconsistent findings in determining that the defendants were acting within constitutional requirements in proceeding to desegregate public higher education statewide, but were acting unconstitutionally in the Nashville area. In support of this claim the appellants point out that both TSU and UT-N had a larger percentage of "other race" students at the time of the 1977 hearing than any of the other public institutions.

The UT Board's brief prefaces its argument that the district court applied an impermissible constitutional standard with the following statement: "The District Court ap-

parently concluded that the existence of a predominantly black institution of higher education in a free-choice system, in and of itself, created a dual system of higher education which offended the Constitution." This is not an accurate statement of the district court's holding. It was not the existence of a predominantly black institution ***in and of itself*** which the district court held offended the Constitution. It was the failure of the defendants to dismantle a statewide dual system, the "heart" of which was an all-black TSU, which was found to be a continuing constitutional violation. While the district court found in 1968 that the defendants had not been guilty of constitutional violations in the *recent past*, it specifically found in the same opinion that "the dual system of education created originally by law ha[d] not been effectively dismantled." 288 F.Supp. at 940. The district court made the same finding in each of its subsequent opinions, and this was the basis of its merger order.

B. The Affirmative Duty to Dismantle the Dual System

The fundamental disagreement between the district court and the appellants concerns the duty of a state to remove the vestiges of state-imposed segregation. The appellants point to the obvious differences between elementary and secondary education on the one hand and higher education on the other. One is free and compulsory and pupils are assigned to particular schools. The other is purely elective, requires the payment of tuition and fees, and permits students to choose a particular school for a variety of reasons. Most elementary and secondary schools in a given system are roughly equal in curriculum and facilities whereas individual colleges and universities vary greatly in their offerings and emphases. All these factors were discussed fully in *ASTA*, supra, 289 F.Supp. 784.

The district court recognized these differences in the present case. Also, it agreed with the *ASTA* court that the

"basic requirement" of the affirmative duty to dismantle a dual system of higher education was met when an open admissions policy was adopted and good faith was exercised in dealing with admissions, faculty and staff. However, the district court found that something beyond this basic requirement was needed to satisfy the constitutional imperative in the present case where segregation was once required by state law and "egregious" conditions of segregation continued to exist in public higher education in the Nashville area. What was required, the court found, was affirmative action to remove these vestiges. The district court relied principally on *Green* v. *County School Board*, 391 U.S. 430 (1968), where a "freedom-of-choice" plan was held to be an inadequate compliance by a school board with the constitutional requirement that a well-entrenched dual system be dismantled. The Court held in *Green* that in such a situation a school board is "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38.

The appellants argue that *Green* and similar decisions apply only to elementary and secondary education, not to public higher education. *Green* was concerned with whether a violation which continued after a freedom-of-choice plan was initiated required affirmative action. We conclude that the *Green* requirement of an affirmative duty applies to public higher education as well as to education at the elementary and secondary school levels. We agree with the court in *Norris* v. *State Council, supra*, that "the State's duty is as exacting" to eliminate the vestiges of state-imposed segregation in higher education as in elementary and secondary school systems; it is only the means of eliminating segregation which differ. 327 F.Supp. at 1373.[2]

[2] The commentators who have dealt with this subject have uniformly concluded that *ASTA* was too restrictive in dealing with the

The Supreme Court has never dealt with the precise issues in this case. Both *ASTA* and *Norris* were decided without opinion, though Mr. Justice Douglas filed a dissent in *ASTA*. Sixteen years before its decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), the Supreme Court held that it was a denial of equal protection for a state to deny admission to the law school of a state university to a Negro applicant while failing to provide a separate, equal opportunity for legal education within the state. *Missouri, ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). See also *Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma*, 339 U.S. 637 (1950). The fact that the Supreme Court has not addressed the issue of desegregation in public higher education since abandonment of the "separate but equal" doctrine in *Brown I* does not persuade us that it would hold that a state which once required separation of the races in public institutions of higher education has no duty to do more than establish an open admissions policy. The teachings of numerous decisions beginning with *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*), are to the contrary. In *Brown II* the Court referred to its historic opinion in *Brown I* as "declaring the fundamental principle that discrimination in *public education* is unconstitutional . . .." 349 U.S. at 298. (emphasis added). The constitutional violation in *Brown I* consisted of the state's requiring that students be segregated by race; the level of education at which the enforced separation was required was not determina-

affirmative duty to remove vestiges of a state-imposed dual system of public higher education. See, The Affirmative Duty to Integrate in Higher Education (Note) 79 Yale L.J. 666-697 (1970); Integration of Higher Education in the South (Note) 69 Colum. L. Rev. 112 (1969); Desegregation-College's Duty to Take Affirmative Action to Integrate Beyond the Institution of a Non-Discriminatory Admissions Policy (Note), 4 Harv. Civ. Rights — Civ. Lib. L. Rev. 443 (1969). The one article dealing with *Norris* found its requirements distinctly preferable to those of *ASTA*. See, Integrating Higher Education: Defining the Scope of the Affirmative Duty to Integrate (Comment), 57 Iowa L. Rev. 898 (1972).

tive. No distinction was made between public higher education and public elementary and secondary education, and we can perceive none in defining the constitutional right of equal opportunity.

After the court declared in *Brown I* that enforced separation in education is "inherently unequal," 347 U.S. at 495, the states were given an opportunity to dismantle their dual systems voluntarily. Some proceeded rapidly to accomplish this, *Brown II*, 349 U.S. at 299, and other violators were directed to proceed to do so "with all deliberate speed." *Id.* at 301. By the time of *Green* 13 years had elapsed since the decision in *Brown II* and the only step taken by the Kent County School Board was the institution of a freedom-of-choice plan. The Court found that this plan was not bringing about an end to segregation and offered no realistic promise of doing so. Under these circumstances the Supreme Court held that there was an affirmative duty to devise and implement a plan that would lead to elimination of all vestiges of the system of state-imposed segregation. There is nothing in the *Green* opinion which indicates that a different requirement would apply in public higher education.

C. The Failure to Dismantle the Dual System

The facts of the present case are closely analogous to those in *Green*. Thirteen years after *Brown II* the only step which the Tennessee defendants had taken toward dismantling the dual system of public higher education was inauguration of an open admissions policy. The evidence was uncontradicted that little progress had been made. Yet the District Judge did not immediately impose a plan on the State, recognizing its strong interest in making educational policy decisions. Instead, he directed the defendants to formulate a plan. Though several plans were put forward in subsequent years none really came to grips with the Nashville situation. There

the vestiges of state-imposed segregation were clear and undiminished in reality.

The Constitution may be violated by inaction as well as by deeds. Here the district court found evidence of both inaction and wrongful action in assessing conditions in public higher education in the Nashville area. During the course of this litigation UT-N grew from a non-degree-granting "center" of the University of Tennessee to a branch of the University with a four-year degree program. During this period the student body of UT-N grew from 1800 to 3500, of whom 89 per cent were white, while that of TSU remained virtually static. From these facts the district court concluded that the existence and expansion of the predominantly white UT-N alongside the traditionally black TSU "have impeded the dismantling of the dual system." 427 F.Supp. at 652.

The appellants dispute this conclusion, pointing to the differences between TSU and UT-N. They emphasize that TSU is a "traditional university" with a broad range of offerings and a student body of traditional college age, most of whom live on campus. On the other hand, UT-N has limited offerings primarily intended for older working students who can attend classes only in the late afternoon and at night. Granting that these distinctions exist, nevertheless the district court had abundant evidence to support its findings. More than one expert witness testified that the most likely source of white students for a traditionally black university in an urban area is older working students. Thus the rapid development of UT-N into a degree-granting four-year branch, even though it continued to be primarily a night school, did impede the progress of desegregation of TSU.[3]

[3]The findings of the district court in this regard were similar to that of the court in *Norris, supra*, which stated:

> [O]ne agency of the State, Bland [the white college], cannot impede another agency of the State, Virginia State [the black college], in its efforts to fully integrate its student body. 327 F.Supp. at 1373.

D. Conclusion

We conclude that the district court did not base its finding of a constitutional violation on the mere existence of one identifiably black university in the entire system. As the defendants point out, the Supreme Court held in *Swann, supra*, the existence of a "small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law." 402 U.S. at 26. The district court in the present case did not base its finding on the existence of predominantly black TSU "in and of itself." To the contrary, Judge Gray specifically found that TSU required special attention because it was "the heart of the dual system." Further, he found that TSU continued to be predominantly black long after the open admissions policy was instituted because of a failure by state officials to take meaningful actions to facilitate its desegregation while acting with respect to UT-N in ways which impeded the required dismantling of the dual system. There was no failure to articulate the standard by which the district court determined that a constitutional violation existed in Nashville and no fatal inconsistency in his findings, as contended by the defendants.

The findings of the district court on the actions and inactions by the defendants are supported by substantial evidence and are not clearly erroneous. The conclusion that these actions and failures to act constitute a violation of the constitutional duty to dismantle a dual system of public higher education is in accord with pronouncements of the Supreme Court from *Brown II* to the present time. Where an open admissions policy neither produces the required result of desegregation nor promises realistically to do so, something further is required. *Green, supra; Norris, supra; Hunnicutt* v. *Burge*, 356 F.Supp. 1227 (M.D. Ga. 1973); *Lee* v. *Macon County Board of Education*, 317 F.Supp. 103 (M.D. Ala. 1970), *aff'd in part*, 453 F.2d 524 (5th Cir. 1971).

THE MERGER REMEDY

A. The Propriety of Merger as a Remedy

The appellants argue that the merger remedy was beyond the district court's equitable power and was not an "appropriate" remedy. It is clearly established that a district court is controlled by general principles of equity in fashioning a desegregation remedy. *Swann, supra; Brown II, supra; Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*). This axiom was discussed by the Court in *Milliken II* in the following language:

> Application of those "equitable principles," we have held, requires federal courts to focus upon three factors. In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S., at 16. The remedy must therefore be related to "the *condition* alleged to offend the Constitution . . . ." *Milliken I*, 418 U.S., at 738. Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.*, at 746. Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. In *Brown II* the Court squarely held that "[s]chool authorities have the *primary* responsibility for elucidating, assessing, and solving these problems . . . ." 349 U.S., at 299. (Emphasis supplied.) If, however, "school authorities fail in their affirmative obligations . . . judicial authority may be invoked." *Swann, supra*, at 15. Once invoked, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Ibid.*
>
> 433 U.S. at 280-81. (Footnotes omitted).

Applying these principles we conclude that merger was within the equitable power of the district court. The merger remedy was related to the condition found to offend the Constitution. This "condition" was failure to dismantle a dual system. The core of the problem was found to be the inability of TSU to attract a "white presence" to its campus because of the competition of UT-N for students in the Nashville area. This competition would not have been so formidable if UT-N had remained a non-degree-granting extension center. Its expansion to a four-year degree-granting institution greatly inhibited the efforts to desegregate TSU. Further, the remedy of merger effectually restores the victims of discrimination to their rightful place. The black students had a constitutional right to attend a unitary system of higher education, which was denied them by state action. The merger will permit TSU to expand as a comprehensive urban university, offering educational opportunities to students of traditional college age and older working students in a desegregated setting. The nature of the remedy does not exceed the nature and scope of the violation.

The district court stayed its hand for years in order to give the defendants an opportunity to effectuate a meaningful desegregation of TSU. The court initially approved the approach championed by the defendants of instituting joint and cooperative programs while permitting the two institutions to continue their separate existence. After nearly nine years the court found that no progress was being made with this approach and that this failure resulted largely from the inability of the governing boards to agree. The district court clearly took into account the interest of the defendants in managing higher education programs of the State on a statewide basis. However, when the authorities "fail[ed] in their affirmative obligations," *Milliken II, supra*, 433 U.S. at 281, the court properly invoked its equitable power.

The scope of the district court's equitable power is broad

enough to encompass a merger order under the facts of this case. The court's experience taught that the only meaningful results were obtained when it ordered the graduate program in education transferred exclusively to TSU. A merger of the two institutions will involve the district court in their day-to-day affairs to a much less pervasive degree than any attempt by it to divide and allocate all the various programs to one school or the other. Merger also intrudes less into the freedom of students to attend a college of their choice than any plan which might require compulsory assignments to bring about a dismantling of the dual system. The acknowledged differences between higher education and education at the primary and secondary levels appear to make such frequently used remedies as assignment and transportation of students to a particular institution unworkable as well as undesirable.

It should also be noted that merger is not unheard of in the Tennessee public higher education system. The record discloses that the University of Tennessee and Memphis State University both conducted night classes in Memphis at one time. The University of Tennessee proposed to change its Memphis extension center to a degree-granting resident center. After negotations between the two institutions the program at the UT center was phased out and Memphis State began operating a "joint university center." The final effect of these developments was a merger with Memphis State the surviving institution.

B. Legality of Inclusion of UT-N in Merger Order

The appellants next contend that even if there was a violation the merger ordered by the district court was an improper remedy. The UT Board argues that the merger order is the equivalent of an interdistrict order such as was proscribed by the Supreme Court in *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I*). The specific language relied upon is as follows:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.
>
> 418 U.S. at 744-745

This argument fails for two reasons. First, it does not recognize the underlying reason for avoiding interdistrict remedies – the strong public interest in maintaining local control over public schools. *Milliken I, supra.*[4] Both the UT Board and SBR have state-wide jurisdiction over their respective systems. Neither is the equivalent of a local school board through which a local community exercises control over the education of students living in that community.

Even if the two separate governing boards within the state-wide system of public higher education in Tennessee could be considered equivalent to separate school boards there is another fundamental reason for holding that *Milliken I* does not forbid involvement of the UT Board in desegregation in the Nashville area. Immediately following the language of the Supreme Court which is quoted above the court stated:

> Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of

[4] "No single tradition in public education is more deeply rooted than local control over the operation of schools; local automony has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." 418 U.S. at 741-42. (citation omitted).

> race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. 418 U.S. at 745.

The district court found that acts of the UT Board in expanding the program and size of UT-N impede desegregation of TSU and thus the dismantling of Tennessee's dual system of public higher education. The appellants argue that this is not a finding of a constitutional violation. However, the court found that the effects of the earlier state-imposed segregation were not being eliminated in the Nashville area, in part at least, because of the expansion of UT-N and the unwillingness or inability of the UT Board to agree to programs which realistically promised to remove the vestiges of the old order. This is a finding that actions of the UT Board perpetuated segregation in the Nashville area and is sufficient to support an "interboard" remedy under *Milliken I*.

Finally, the UT Board contends that it was an "innocent party," pointing out that the district court made no finding that its recent actions were intended to perpetuate segregation. The holdings of the Supreme Court with respect to intent in *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Keyes* v. *School Dist. No. 1.*, 413 U.S. 189 (1973), apply to de facto, not to de jure segregation. *NAACP* v. *Lansing Board of Education*, 559 F.2d 1042, 1045 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); *United States* v. *Texas Education Agency*, 564 F.2d 162, 165 (5th Cir. 1977). The UT Board appears to argue that only SBR practiced de jure segregation since it and its predecessor, State Board of Education, operated all-black TSU as part of the regional system which also included all-white institutions. Since it operated only an all-white university and no black institutions the UT Board contends it was not engaged in de jure segregation. This argument is specious. De jure segregation was maintained throughout Tennessee public higher education prior to 1960 both by the exclusion of Negroes

from the University of Tennessee and SBR institutions and the operation of TSU as an all-black university. The duty to dismantle the dual system falls on both boards.

The present case is controlled by *Newburg Area Council, Inc.* v. *Board of Education of Jefferson County, Kentucky*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). In *Newburg* we distinguished *Milliken I* as follows:

> A vital distinction between *Milliken* and the present cases is that in the former there was no evidence that the outlying school districts had committed acts of de jure segregation or that they were operating dual school systems. Exactly the opposite is true here since both the Louisville and Jefferson County School Districts have been expressly found by this Court to have failed to eliminate all vestiges of state-imposed segregation. Consequently, as contrasted with the outlying Michigan districts, they are guilty of maintaining dual school systems. 510 U.S. at 1359.

We conclude that the district court did not exceed its powers in directing that UT-N be merged with TSU even though the two institutions have been under the control of different statewide boards. The Fourteenth Amendment provides that *no state* "shall deprive any person within its jurisdiction the equal protection of the laws." It was the State, acting through its legislature, which required for many years that black persons pursuing an education in a public institution of higher education be isolated from white persons engaged in the same endeavor. The colleges and universities under the jurisdiction of the UT Board as well as those under SBR were operated as part of a dual system. Both boards and all the public institutions are instrumentalities of the State. After the doors of all institutions were opened to all qualified applicants without regard to race, the effects of the previous segregation lingered. TSU remained an almost totally black university in student body, faculty and administration. Its efforts to

desegregate were directly affected by competition from the expanding UT-N. Since the policies and actions of the UT Board contributed to the perpetuation of the dual system there was no legal reason why it should not be required to participate in the court-ordered plan for dismantling that system.

CONCLUSION

The appellants insist that the district court has failed to consider the vital interests of the State in being able to make educational policy decisions on a statewide basis. They contend that the court has unnecessarily interfered with decisions as to the roles and functions of the various institutions. These arguments are not persuasive. Those policy decisions of the two boards and THEC which failed to take into account the State's constitutional duty to dismantle its dual system must yield to that duty. Though TSU and UT-N were given different roles in the overall scheme of public higher education there was an abundance of expert testimony that they could be combined and that one institution could perform all the functions previously assigned to them separately. Basically the defendants insist upon treating the existence of TSU as an isolated unconstitutional condition rather than the core of a violation which permeated the entire system. The district court never found that the dual system had been dismantled everywhere but at TSU. On the contrary, Judge Gray found that some progress was being made statewide and that if the situation in Nashville were remedied, there would be promise of greater progress throughout the system.

We do not deal with various objections to the plan of merger filed after this appeal was taken. With the issuance of this court's mandate this case will again be before the district court for whatever steps are necessary in the implementation of the orders which we affirm. By that time many

of the steps contemplated in the plan of merger will have been taken. If any parties continue to feel that the plan is deficient they will have an opportunity to bring their views to the attention of the district court. If further hearings are required with respect to the plan there will be no impediment to the district court's holding hearings while implementation goes forward.

We recapitulate our holdings: (1) the district court did not err in holding that the defendants have an affirmative duty to dismantle the dual system of public higher education which heretofore existed in Tennessee; (2) the district court did not err in holding that the open admissions policy instituted in 1960 failed to dismantle the dual system; (3) the district court did not err in holding that the defendants are required to take affirmative steps to complete dismantling the dual system; (4) the district court did not err in finding that the existence of an expanding UT-N in close proximity to TSU has impeded the progress of desegregating TSU and of dismantling the dual system; (5) the district court did not exceed its equitable power or impose an inappropriate remedy in ordering merger of UT-N and TSU under the governing authority of SBR.

The judgment of the district court is affirmed on the appeals of the UT Board and THEC. No costs allowed.

ENGEL, Circuit Judge, dissenting. I respectfully dissent. In my opinion the ordered remedy of a merger of the University of Tennessee-Nashville (UT-N) and Tennessee State University (TSU) is violative of the principles set forth in *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I*), because it goes beyond the constitutional wrong found to have been committed by the University of Tennessee (UT) and, equally important, because it tends to strengthen rather than eliminate segregation in higher education in Tennessee.[1]

The controlling truths in this case are readily apparent. Historically the public institutions of higher education in Tennessee were segregated by law.[2] Black students were not admitted to UT and white students were not admitted to TSU. The faculty at UT was white and the faculty at TSU was black. Comparable segregation existed in the administrative staffs.

Until this litigation began in 1968, both UT and TSU remained identifiable by race on the levels of faculty, administration and student body. While the district court reports that

[1] *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*), found the Supreme Court reaffirming its holding in *Milliken I*. The Court stated:

> The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, see *Pasadena Bd. of Education* v. *Spangler*, 427 U.S. 424 (1976), or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation, as in *Milliken I*, *supra*. *Hills* v. *Gautreaux*, 425 U.S. 284, 292-296 (1976).

433 U.S. at 281-82. *See also Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

[2] Art. 11 § 12 of the Tennessee Constitution of 1870; Tenn. Code Ann. §§ 49-3701-703. Laws requiring segregation of the races in Tennessee were held to be unconstitutional in *Roy* v. *Brittain*, 201 Tenn. 140, 297 S.W. 2d 72 (1956). *Cf. Booker* v. *Tenn. Bd. of Educ.*, 240 F. 2d 689 (6th Cir.), *cert. denied*, 353 U.S. 965 (1957).

satisfactory progress has been made throughout the rest of the system, a ruling which we affirm in the companion case of *Richardson* v. *University of Tennessee*, Nos. 77-1622/4, filed April 13, 1979, it held, as does the majority opinion here, that the vestiges of the dual system remain in TSU, which continues to have a virtually all black student body and continues to have a heavy majority of blacks on the administrative staff and faculty.

The instant litigation has been fairly and accurately summarized by Judge Lively in the majority opinion. As can be seen from that account, this litigation commenced when parties, purporting to represent the interests of blacks and TSU, complained of the proposed expansion of UT's downtown night school in Nashville, which had been established in 1947, to provide instruction for part-time students who worked in state government, business and industry. UT-N was then an extension center offering resident credit, but granting no degrees and teaching no advanced courses. Since Nashville is the capital of the state, it is not surprising that such a school would be established in the center of the city, and at least the initial establishment of the school appears to have been for reasons other than race. *Sanders* v. *Ellington*, 288 F. Supp. 937, 941 (M.D. Tenn. 1968). It was not competitive with the requirements of a full curriculum university such as TSU. Nevertheless, the potential competition from this center caused the commencement of the present litigation. While the district judge did not enjoin the expansion of the UT-N center, it was apparent that he was properly determined in the ensuing litigation to ascertain the extent to which the fears of TSU might be justified.

Substantial evidence supports the district court's and Judge Lively's finding that the expansion of UT-N was in fact competitive with the educational opportunities presented at TSU and I cannot fault the conclusion that the expansion, unless halted, would undoubtedly have seen UT establishing a full

four-year university program in Nashville, directly competitive with TSU.[3] It is a reasonable and almost inescapable conclusion that the proposed and actual expansion of UT-N was the result of public pressure to have operating in the Nashville area a local public university, not having the racial identification as a black university which TSU was perceived to possess.

Clearly UT's efforts to expand under such circumstances would strongly tend to impede any legitimate effort on the part of TSU to integrate. Since both systems had been a part of a *de jure* segregated system of higher education in Tennessee, I cannot, therefore, disagree that a duty to refrain from such conduct might be found to rest upon UT.[4] Likewise, I agree that *Milliken I, supra,* and even more, *Wright* v. *Council of the City of Emporia,* 407 U.S. 451 (1972), and *United States* v. *Scotland Neck City Board of Education,* 407 U.S. 484 (1972),[5] would not prohibit an appropriate interdistrict or intersystem remedy under such circumstances. The difficulty here, however, is that the remedy is not responsive to the ill.[6]

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[3] In 1971 UT-N became a degree granting institution, entrusted to the management and control of the Board of Trustees of the University of Tennessee. Tenn. Code Ann § 49-3352 (1977).

[4] To the extent that the vestiges of discrimination remain from the prior system of *de jure* discrimination, I recognize that the state has a duty to take affirmative steps to erradicate those vestiges. *Green* v. *County School Bd.*, 391 U.S. 430 (1968).

[5]

> In Wright v. Council of the City of Emporia . . . and in United States v. Scotland Neck Board of Education . . . the Supreme Court refused to permit the establishment of separate school districts within a single county, even though authorized by state law, where it was found that this would impede the process of dismantling a segregated school system. By analogy no justification appears for permitting [UT and the State Board of Regents] to remain completely autonomous if the effect is to impede the process of desegregating the schools . . . .

Newburg Area Council, Inc. v. *Bd. of Educ.*, 510 F. 2d 1358, 1361 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975).

[6] *Newburg Area Council, supra,* cited by Judge Lively as authority for the interdistrict remedy, dealt with a situation where an interdistrict remedy was found to be appropriate. There, both the Louisville and Jefferson County School Districts were expressly found to have failed to eliminate vestiges of *de jure* segregation. In fact, the two districts had combined their efforts to segregate the races.

> For example, in pre-*Brown* days black high school students in the Jefferson County school district were sent to the black Central High School located in the Louisville school district. This was done because the county had no black high school, and it was done on a tuition basis paid by the county. While this action by itself might be insufficient to invoke the equitable power of the court, *see* [*Milliken I*,] 418 U.S. 717, 94 S. Ct. 3112, there are other instances in the present case of disregarding school district lines. Atherton High School is an example. Atherton is a high school belonging to the Louisville school district, but it was and is located outside the boundaries of that district and within the territory of the Jefferson County school district. Students from both school districts have been permitted to attend the school.

510 F. 2d at 1360. Thus, it was clear that the two districts assisted each other in perpetrating the racial segregation.

In *Milliken I,* however, the Court was faced with quite a different situation. There, the school districts outside Detroit were not found to have committed acts of *de jure* discrimination. The Supreme Court held that the imposition of the interdistrict remedy did not go to meet the constitutional violation within the City of Detroit.

The situation presented by the instant litigation more nearly resembles *Milliken I* than *Newburg Area Council.* The acts of UT did not create the segregation at TSU. Certainly UT's history shows an obedience to Tennessee law in the commission of acts of *de jure* discrimination, and the vestiges of those acts are properly the subject of the remedial action mandated in the companion-*Richardson* case. And, to the extent that UT's and UT-N's actions have competed with TSU for white students, thereby hampering TSU's desegregation efforts, UT-N may have violated its constitutional duty. Nevertheless, to find that UT, through the establishment of the Nashville Campus, either created or, in the non-competing areas, contributed to the segregation of TSU is beyond basis in this litigation. To go further than preventing UT-N from hindering the desegregation effort at TSU finds the court imposing a remedy that exceeds any constitutional violation by UT or UT-N.

The majority opinion speaks repeatedly in one form or another of the failure of all previous efforts on the part of the parties to "remove the vestiges of state-imposed segregation." Majority opinion at 17. What it really means is that the state has never succeeded in obtaining racially balanced faculty at TSU, nor either has it persuaded black applicants for admission to TSU to attend other schools which are now open to them, or conversely has it persuaded potential white college students to attend TSU. The reasons for this are somehow

all laid at the door of UT, even though the court has found that UT itself has been satisfactorily integrating its faculty, staff and student body, and that in fact, its composition and its racial balance are becoming representative of the racial balance of the state as a whole.[7] *Geier* v. *Dunn*, 337 F. Supp. 573, 580 (M.D. Tenn. 1972) (with the exception of TSU, the universities in Tennessee are being desegregated at a constitutionally permissible speed). UT-N is being ordered to transfer over its property to a school which is not integrated[8] in the hope that somehow that action will solve the problem. In truth, the problem lies in other factors.

In my opinion there is little that the courts, and for that matter the public institutions themselves, should do to dis-

[7] As the following table indicates, the integration effort for UT and UT-N was producing acceptable results.

	Black Enrollment as % of Total Enrollment			Black Faculty as % of Total			Black Administrators as % of Total		
	UT	UTN	TSU	UT	UTN	TSU	UT	UTN	TSU
1969	3.2	7.4	99.0	1.7	NA	95.0	2.5	NA	100.0
1970	3.6	5.7	98.5						
1971	4.1	8.7	97.7	1.8	1.7	89.1	3.3	0.0	98.5
1972	4.5	10.9	95.7						
1973	5.1	10.4	93.1	2.6	3.1	78.2	4.7	0.0	93.7
1974	5.7	10.5	87.6	3.0	4.9	70.3	5.6	2.1	78.1
1975	6.4	12.7	85.0	3.1	4.1	68.8	5.8	4.9	88.5

And, Judge Lively notes that the appellants point out that both TSU and UT-N had a larger percentage of "other race" students at the time of the 1977 hearing than any of the other public institutions. Majority opinion at 16.

[8] See note 7, *supra*.

Although TSU has been slowly desegregating its student body, TSU has not approached the degree of success enjoyed by UT-N in attracting a student body whose racial composition approximates that of the relevant population. The argument that TSU is integrated because it has one of the largest "other race" representations in its student body merely serves to confuse the issue. "Other race" must mean "other than the majority race in the relevant population" to allow meaningful comparisons of the results of desegregation. As quoted in note 7, "other race" does not mean this, and thus the implied representation that TSU is thereby integrated is unfounded. As the district court concluded, "[d]esegregation at TSU, except for faculty, has been minimal. . . ." *Geier* v. *Blanton*, 427 F. Supp. 644, 660 (M.D. Tenn. 1977).

courage attendance at a state institution of higher learning by any applicants because of race. Nevertheless, the exercise of what ought to be a free and personal choice on the part of student applicants is itself treated somehow as the sufferance of a constitutional violation by the institutions involved. As Judge Lively's opinion points out, unlike the other regional schools throughout the state and under the control of the State Board of Regents, TSU continues to draw black students from the entire State of Tennessee. I do not doubt that its attractiveness to black students may very well affect the racial balance of the student bodies of the other colleges throughout the State of Tennessee, but is this a reason for finding fault with it? If a student elsewhere in the state has the right, as he now has in Tennessee, to enroll in a regional college of his choice without impediment because of his race, is it wrong for him to elect to go to a college such as TSU if he prefers? I can hardly believe it. Likewise, if TSU is and remains racially identifiable because of the racial composition of its faculty and staff, are we to compel a white student in a non-compulsory system nonetheless to attend the school which he identifies as black? Obviously, there is much less that courts and institutions should or can in fact do in this area where attendance is voluntary. This fundamental difference between higher education and the compulsory nature of public education at the primary and secondary levels has been consistently recognized. *See Lee* v. *Macon County Board of Education*, 453 F. 2d 524, 527 (5th Cir. 1971); *Alabama State Teachers Association* v. *Alabama Public School and College Authority*, 289 F. Supp. 784, 787-88, 790 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969) (per curiam). *Cf. Florida* ex rel. *Hawkins* v. *Board of Control*, 350 U.S. 413 (1956); *Norris* v. *State Council of Higher Education*, 327 F. Supp. 1368, 1381 (E.D. Va.) (Hoffman, J., dissenting in part), *aff'd sub nom.*, *Board of Visitors of the College of William & Mary* v. *Norris*, 404 U.S. 907 (1971).

The real difficulty, apparent throughout the entire record in this case, and a difficulty with which I have considerable sympathy, lies in the efforts of TSU to retain its identification as a black university. Unfortunately this factor has had a strongly deterrent effect upon its attractiveness to white applicants. The record makes it altogether evident that much of the concern of TSU has been not only with the competition for students which it faces, but with the fact that it may lose its identity as a respected and long-standing black university.[9] Nevertheless, in a time when opportunities for integrated education are becoming increasingly available, a school which primarily attracts but one race may find it increasingly difficult to prosper.

[9] Numerous witnesses testified about the importance and desire of retaining black identity and control at TSU. As examples, consider the following testimony. Frederick Humphries, the President of TSU, stated:

> It is an especially pertinent question for Tennessee State that it be given the opportunity [to expand] because the damage to black people, you know, can an institution which has black administration, a black department chairman, black deans go into the future and become a very strong and creative part, you know, and have a chance of becoming the strongest institution in the higher educational system?
>
> Now, that is important to preserve because it has a whole lot of impact for a lot of black kids in the society. When you start denying that opportunity and constraining that opportunity you are messing with a psychological aspect of a whole lot of people. Which, you know, the question is: Would they have made it if they had been given the opportunity? All right.
>
> • • •
>
> The Nashville area desegregation deals with a whole lot of things that is going to have a whole lot of impact on a lot of people. It is particularly important for black people because Tennessee State was identified in the past with them. And it is important that they be given the opportunity to become the kind of institution that it can become.

Manlon J. Griffith, employed by TACTICS, an organization basically providing technical assistance to black colleges, testified:

> I feel very seriously that our black colleges are threatened by integration . . . and in so doing the leadership potential of the black race and in this country is diminished and will continue to diminish and will be obliterated in the course as it is seemingly going. . . . If they should eliminiate our college, they will have eliminated black people from any meaningful participation in our democracy.

Dr. Elias Blake, Jr., the head of the Institute for Services to Education, an organization devoted to research and development related to expanding equal opportunity, primarily for blacks, testified in response to the quoted question:

> Q. Some of these values which you testified may be lost, I mean about black expertise and black culture and so on, may be lost if Tennessee State University is immediately made into a white university. A. Yes, I would be opposed to any order which said that by such and such a time it must be eighty percent white. I think that to do that it would create serious problems in terms of continued education.

In addition, the majority opinion notes that the UT-N — TSU merger plan "provides for an implementation committee made up of members from SBR, UT Board and THEC, a majority of whom may be black." Majority opinion at 15.

It seems to me that TSU must reach the reluctant conclusion that the Equal Protection Clause no longer will permit the state purposefully to maintain and perpetuate a faculty and staff whose composition is disproportionate to the racial composition of the area which it purports to serve. At the same time, the desegregation of a faculty such as that at TSU is nowhere near as simple a matter as the desegregation of the faculty in a primary and secondary school system in which teachers can be transferred with relative ease from one school to another within the same system and community. That is simply not possible here where TSU constitutes the only member of the State Board of Regents system in the Nashville area.

It would be manifestly inequitable to require that black teachers be displaced with white teachers merely to achieve a racial balance. In my judgment, the individual injury which this would occasion outweighs any potential constitutional benefit. So much is recognized, I believe, in the plans for the desegregation of the faculty which are already in effect. It would be enough if the establishment of a racially balanced faculty at TSU were left to the prospective operation of a truly neutral faculty selection system, leaving it to attrition

to restore the balance which equal protection may be found to require. Instead, my reading of the majority opinion indicates that the district court approved a program which compels TSU to hire a white teacher in all vacancies which may prospectively exist unless a black applicant is, in fact, superior. Majority opinion at 9. The Supreme Court of *Brown I* and *Brown II* would be amazed to find that its decisions had come to this end.[10] Such a ruling represents not only bad policy, but unjustified and hence unconstitutional discrimination against black applicants of equal talent.

It may take somewhat longer to achieve actual racial balance at TSU by a more neutral policy, but in the long run, it is infinitely preferable both in principle and in impact. If left to stand, the district court's plan would result in a faculty whose older members were predominately black and whose younger members were overwhelmingly white. When a nose-count balance was achieved, the retirement or departure of the older faculty would again create a reverse imbalance which would have to be corrected. This simply makes no sense. What the TSU faculty and staff selection mechanism should be learning, and learning now, is how to be neutral, not how to discriminate the other way.

If the facilities are adequate, if any discrimination has otherwise been eliminated, and if TSU is making an honest and diligent effort to achieve a modicum of racial balance in its faculty and staff, then I believe that any perceived evil in the racial composition of the student body will cure itself, to the extent this is even needed. There is undoubtedly a need for a four-year public institution of higher learning in Nashville and this is probably one of the needs which generated the pressure to create UT-N. It is a pressure which will remain to persuade students to attend TSU in increasing numbers as that institution, by its own colorblind policies, becomes more attractive to white students and less identifiable

[10] *See Milliken I, supra*, 418 U.S. at 745.

as an all black college. By 1975, 12.2% of the students at TSU were white. White student participation in the student body at TSU can, it seems to me, be expected to grow in direct proportion to the ability and willingness of TSU to shed its former identification as an all black college and to assume a new and enlarged role as an integrated university and as a full part in the system operated by the State Board of Regents.

It is somehow suggested that there is no harm in the proposal by the district court to transfer UT-N to TSU, and as authority for that there is cited a comparable voluntary effort in Memphis wherein UT relinquished to the Memphis State University its control over a night school operated by UT. *See Geier* v. *Blanton*, 427 F. Supp. 644, 653 (M.D. Tenn. 1977). In my opinion there is a world of difference between conduct undertaken by state agencies of their own free will, and conduct required of state agencies by federal courts.

As pointed out in the majority opinion, UT has enjoyed under Tennessee law a unique and distinct place in the state's scheme of higher education, a place apart from that of other institutions and entirely apart from racial factors. The separate systems were not developed to separate black students from white for, in pathetic fact, both systems were originally white. Parallel systems of state supported college education are found extensively throughout the United States. They normally have nothing to do with racial considerations, but rather result from historic developments reflecting the state's diverse needs in the area of higher education. Until a system itself is employed to impose or foster a segregated educational experience, its integrity should be respected by our courts.[11]

[11] The Supreme Court, in *Milliken I*, recognized the broad powers properly vested in the states to structure their educational systems to fit the particular needs of their citizens. In describing one of the reasons why the interdistrict remedy was inappropriate, the Court stated:

> . . . it is obvious from the scope of the interdistrict remedy itself that absent a complete restructuring of the laws of Michi-

If there were to be any merger at all, clearly the more logical merger would be to move TSU into UT, for it is TSU which remains substantially disproportionate in its racial composition compared to the remainder of the system. The unworkability of such a merger, however, for practical purposes, is apparent from the record and must have been persuasive to the district court. Both faculty and student admission standards are too widely variant to permit such a merger without causing real loss and genuine deprivation of opportunity for both black students and faculty. I can well understand, therefore, that such a plan would necessarily not be attractive. Efforts to work a *de facto* merger by interchange of programs and the like were unsuccessful, as pointed out by the majority opinion, although the reasons for assigning the fault to UT-N is not apparent. The overriding truth remains that the racial identifiability of TSU has thus far impaired its attractiveness to white applicants.

Accordingly, I would vacate the judgment of the district court and remand for further proceedings. Those proceedings should consist of the entry of appropriate injunctive relief to confine UT-N to those courses and activities which were offered prior to the expansion in 1969. *See Norris* v. *State Council of Higher Education, supra,* 327 F.Supp. at 1370. If this seems unduly harsh for UT-N, it can only be said that UT-N was fairly warned of this possible result by the timely commencement of this litigation. This does not seem too onerous a burden if TSU's opportunity to survive as an integrated university is to be protected. Should UT-N not be satisfied with this, there always remains available to it the opportunity to enter into an agreement with TSU such as

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gan relating to school districts the District Court will become first, a *de facto* "legislative authority" to resolve these complex questions, and then the "school superintendent" for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.

418 U.S. at 743-44.

that which is now in effect in Memphis between UT and Memphis State University.

From the foregoing it must be apparent that the heaviest burden in the instant litigation remains upon TSU. This burden compels TSU to make itself attractive to a somewhat diminishing body of potential applicants for admission by proceeding as promptly as possible to integrate its faculty and staff. With UT-N enjoined from encroaching upon programs which are designed to attract white students, TSU's good faith efforts to desegregate should meet with success.

If TSU is otherwise operated in a non-discriminatory manner and if the vacancies on the faculty and staff are filled on a racially neutral basis, I am of the opinion that the commands of the Constitution will have been honored. While one may with great logic be persuaded that the racial makeup of the student body of TSU should be more representative of the racial population of the community as a whole, I would not require it as long as any racial imbalance is the product of personal choice and is not compelled by or the result of state action. Are we to tell some black applicant that he may not attend TSU or some white applicant that he must? This proclivity may indeed be a vestige of historical discrimination, and I fervently decry it, but it is a vestige which remains not in the education system but in the hearts of those who seek to enter it.

Amendment XIV, *United States Constitution*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TENNESSEE CODE ANNOTATED

49-1209. **Rights, powers and duties of board of education not impaired.**—Except for such powers as are vested in the commission by this chapter, nothing herein shall be construed to deprive the board of regents of the authority, rights, powers and duties conferred upon it by law, express or implied, in the government, control and operation of Austin Peay State College, East Tennessee State University, Memphis State University, Middle Tennessee State University, Tennessee State University, Tennessee Technological University, or in the operation and control of the community junior colleges. [Acts 1967, ch. 179, §13; impl. am. Acts 1969, ch. 302, §1; impl. am. Acts 1972 (Adj. S.), ch. 838, §8.]

49-3213. **Management and Control – Curricula – Master's degrees.** – The general management and control of the teacher colleges, state normal school, Tennessee Technological University and Tennessee State University shall be vested in the state university and community college system of Tennessee and the curricula and rules and regulations for the government of said institutions shall be fixed by said system; and the said system is directed to prescribe curricula of senior college grade for all of said institutions and also for the Austin Peay State University. The state university and community college system of Tennessee is authorized, in its discretion, to prescribe curricula necessary for masters' degrees at any of said schools and to authorize any of said schools to confer masters' degrees when such curricula can be offered with existing facilities and within appropriations available. The state university and community college system of Tennessee is authorized, in its discretion, to prescribe curricula necessary for graduate professional degrees, and for doctorate degrees at the Memphis State University and to authorize the said Memphis State University to confer graduate professional degrees, and doctorate degrees when such curricula can be offered with existing facilities and within appropriations available. [Acts 1925, ch. 115, §16; Shan. Supp., §1487a112; Code 1932, §2404; Acts 1939, ch. 33, §1; 1949, ch. 148, §1; C. Supp. 1950, §2404; impl. am. Acts 1953, ch. 85, §1; modified; Acts 1965, ch. 78, §1; impl. am. Acts 1965, ch. 30, §§1, 2; impl. am. Acts 1969, ch. 302, §1; impl. am. Acts 1972, ch. 838, §1; Acts 1973, ch. 144, §1.]

49-3236. **State university and community college system established–Composition–Administration by board of regents.**–There is hereby established a state university and community college system to be composed of Austin Peay State University, East Tennessee State University, Memphis State University, Middle Tennessee State University, Tennessee State University, Tennessee Technological University, Cleveland State Community College, Columbia State Community College, Dyersburg State Community College, Jackson State Community College, Motlow State Community College, Roane State Community College, Shelby State Community College, Volunteer State Community College, Walters State Community College, Chattanooga State Technical Community College, and other community colleges which may be established. The government, management and control of the state university and community college system shall be vested in a board of regents hereinafter called the "board." [Acts 1972 (Adj. S.), ch. 838, §1; 1973, ch. 80, §§2, 4; 1973, ch. 200, §1.]

49-3239. **Board of regents – Powers.** – The board shall have the power to select and employ the chief executive officers of the institutions upon the recommendation of the chief executive officer of the system and to confirm the appointment of administrative personnel, teachers, and other employees of each state institution and to fix their salaries and terms of office; to prescribe curricula and requirements for diplomas and degrees; to approve the operating and capital budgets of each of the universities and community colleges under its control, and otherwise set policies for their fiscal affairs; to establish policies and regulations regarding the campus life of the institutions, including but not limited to the conduct of students, student housing, parking, and safety; and to assume general responsibility for the operation of the institutions, delegating to the chief executive

officer of the respective institutions such powers and duties as are necessary and appropriate for the efficient administration of the institution and its programs. The board shall have the power to receive donations of money, securities and property from any source on behalf of the institutions named above, which gifts shall be used in accordance with the conditions set by the donor. The board shall have the power to purchase land subject to the terms and conditions of state regulations, to condemn land, to erect buildings and equip them for the institution subject to the terms and conditions of legislative appropriations and the board shall be vested with title to property so purchased or acquired. The title to property held on behalf of the above named institutions by the state board of education shall be transferred to the board on the effective date of transfer of responsibility for the government of the above named institutions. The board shall have such other powers, not otherwise prescribed by law, as are necessary to carry out the provisions of §§49-3236–49-3244, and it is the expressed legislative intent and purpose to vest similar and comparable responsibility and authority in the board as is authorized for the board of trustees of the University of Tennessee. [Acts 1972 (Adj. S.) ch. 838, §4.]

49-3352. **Nashville campus—Establishment—Powers of trustees.**—That there is hereby created and established by the state of Tennessee a campus of the University of Tennessee in Davidson County, Tennessee, to be known as "The University of Tennessee at Nashville." The trustees of the University of Tennessee are hereby given the same power, authority and discretion to prescribe and offer courses, curricula, and degree programs offered primarily in the evening, to acquire land and construct buildings, to inaugurate and carry out all necessary supporting work and activities, and to award degrees (of the University of Tennessee) at the University of Tennessee at Nashville, as said trustees now have and exercise at the other colleges and schools of the University of Tennessee. [Acts 1971, ch. 5, §1.]

49-4208. **Identity and status of University of Tennessee retained.**—The University of Tennessee shall retain its identity and status as a legal entity, a body politic and corporate and as one (1) of the state's federal land-grant institutions. Except as herein expressly provided, its board of trustees shall retain and exercise all the authority, rights, powers and duties, express or implied, vested in it by legislative charter and enactments and other applicable laws, and nothing in this chapter shall be construed to deprive the said board of the authority, rights, powers and duties conferred upon it by law in the government of the institutions, branches, colleges, divisions and departments now under its control, except those duties which by this chapter are expressly vested in the commission. [Acts 1967, ch. 179, §12.]

Supreme Court, U. S.
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Nos. 79-10 and 79-55

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE UNIVERSITY OF TENNESSEE, ET AL., PETITIONERS

v.

RITA SANDERS GEIER, ET AL.

TENNESSEE HIGHER EDUCATION COMMISSION, PETITIONER

v.

RITA SANDERS GEIER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 102a-143a) is reported at 597 F.2d 1056. The opinion of the court of appeals in a companion case, *Richardson* v. *Blanton*, Nos. 77-1622, 77-1624 (6th Cir. Apr. 13, 1979) (Pet. App. 83a-101a) is reported at 597

F.2d 1078. The district court's opinion (Pet. App. 37a-75a) is reported at 427 F. Supp. 644. A related order of the district court (Pet. App. 78a-81a) is not reported. Earlier opinions of the district court (Pet. App. 1a-32a) are reported at 288 F. Supp. 937 and 337 F. Supp. 573. An intermediate order of the district court (Pet. App. 33a-36a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1979. The petition for a writ of certiorari in No. 79-10 was filed on July 3, 1979. The petition for a writ of certiorari in No. 79-55 was filed on July 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the district court properly ordered the merger of two state universities located in the same city, when other efforts had proved ineffective to remedy the lingering effects of *de jure* racial segregation.

STATEMENT

A. State-wide de jure segregation

Until 1960 all of Tennessee's public institutions of higher education practiced *de jure* racial segregation (Pet. App. 3a-4a). The largest and oldest of these institutions, the University of Tennessee (UT), was created in 1794 and designated by the General Assembly as Tennessee's state university in 1879. UT

now has campuses at Nashville (UT-N), Chattanooga, Martin, Knoxville, and Memphis. UT-N began in 1947 as a facility at which students could take extension courses offered by UT-Knoxville. UT-N later offered courses for resident credit and in 1971 became a degree-granting institution with full campus status. From its inception, the University of Tennessee, including UT-N, admitted only white students. The racial requirements for admission were not formally abolished until 1960 (Pet. App. 4a). UT is governed by its own Board of Trustees.

Tennessee State University (TSU) was established in 1912 as the state's only public college for blacks. Until 1960 TSU admitted only black students (Pet. App. 4a). TSU is governed by the State Board of Regents, which also has jurisdiction over five other state universities and ten community colleges. Its campus is located less than five miles from UT-N (Pet. App. 104a).

B. The 1968 district court findings and order

In May 1968, five of the private respondents filed this suit in the United States District Court for the Middle District of Tennessee. They alleged that the dual system of higher education established by law in Tennessee had been perpetuated, in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. They sought to enjoin UT from constructing a new facility for the expansion of its program at UT-N (Pet. App. 2a). The United States intervened as a plaintiff and sought in addition an order requiring petitioners "to present

a plan calculated to produce meaningful desegregation of the public universities of Tennessee" (Pet. App. 3a).

The district court found that until 1960 Tennessee engaged in a *de jure* state-wide practice of separate and unequal racial segregation in the State's public higher educational institutions; that since 1960 an open admission policy has been in effect; that by the date of the district court's opinion in August 1968, the State had taken no affirmative steps whatsoever to desegregate the dual system; and that the dual system still existed, with the historically white institutions still overwhelmingly white and TSU still overwhelmingly black (Pet. App. 3a-10a). The district court ordered petitioners to submit a plan for the effective desegregation of Tennessee's higher education institutions, "with particular attention" to the conditions at TSU (*id.* at 10a). The court warned that "the failure to make [TSU] a viable, desegregated institution in the near future is going to lead to its continued deterioration as an institution of higher learning" (*id.* at 11a). The court refused, however, to enjoin the expansion of UT-N (*id.* at 8a). At that time, UT-N was not a degree-granting institution and had an enrollment of approximately 1,800, compared to TSU's enrollment of approximately 4,300. The court observed that "[t]here is nothing in the record to indicate that the University of Tennessee has any intention to make the Nashville Center a degree-granting day institution. On the contrary, * * * in its expansion program for the Nashville

Center, the University of Tennessee seeks only to provide * * * educational opportunity for employed persons of all races who must seek their education at night" (*id.* at 7a-8a). For this reason, the court did not "find that the proposed construction and operation of the University of Tennessee Nashville Center will necessarily perpetuate a dual system of higher education" (*id.* at 8a). The court thought it possible that "this additional educational facility in the Nashville area may play a part in the furthering of a unitary system" (*ibid.*).

C. The 1972 district court findings and order

In response to the district court's 1968 order, petitioners submitted a proposed desegregation plan in April 1969. The plan promised that the predominantly white institutions in the State would make continuing and expanded efforts to recruit black students and faculty members. It also pledged that TSU would intensify its efforts to recruit white students and faculty members by developing and publicizing academic programs that would attract students of both races (Pet. App. 15a, 41a). In addition, the plan announced that "the public institutions of higher education in the Nashville area would institute interinstitutional programs which would help achieve meaningful racial balance in enrollments" (*id.* at 15a; footnotes omitted).

Respondents filed objections to the plan, and, after a hearing, the district court entered an order stating that the plan was insufficiently specific and therefore

could not be approved or disapproved (Pet. App. 16a, 41a). The court directed petitioners to submit a report by April 1, 1970, describing precisely what had been done by that time to implement the plan (*id.* at 16a, 42a). On the basis of this report, the court found that substantial progress had been made on a state-wide scale in attracting black students to the public institutions of higher education in Tennessee (*id.* at 16a). The court further found that the performance of the predominantly white schools in attracting black faculty members was "somewhat more disappointing" (*id.* at 17a). Finally, the court observed that TSU had made "no gain" in integrating its student body (*id.* at 16a).

The private respondents moved for further relief, and the district court scheduled a hearing for June 1971. On the date set for the hearing, petitioners submitted a second desegregation progress report. Its contents were similar to those of the first such report submitted a year earlier. The only potentially significant new development reflected in the 1971 report was the arrangement of a joint engineering degree program between UT-N and TSU. The district court commented, however, that, because "the report [did] not clearly indicate either the number of students and faculty that would be involved or the amount of time each participating individual would spend at the respective schools," its impact on petitioners' desegregation effort could not be evaluated (Pet. App. 18a).

Following a hearing on the two desegregation reports, the district court concluded that "*with the exception of TSU*, [petitioners] are proceeding to dismantle their dual system of higher education, taken as a state-wide whole, at a constitutionally-permissible rate of speed" (Pet. App. 29a; emphasis in original). After reviewing the progress made outside the Nashville area, the court stated (*id.* at 19a):

> By way of contrast, the student body of Tennessee State is shown as 99.7 percent black during the academic year 1970-1971 and its faculty as 81 percent black during that period. Also of significance is the reported fact that the freshman class at Tennessee State for this year was 99.9 percent black.
>
> It is thus clear that Tennessee State remains, in all practical respects, a black institution, while the institutions in close proximity to it, as well as some other institutions in other parts of the State, remain in large part white. And, while it is clear that the desegregation progress of the predominantly white institutions has been steady, the phenomenon of a black Tennessee State, so long as it exists, negates both the contention that [petitioners] have dismantled the dual system of public higher education in Tennessee, as ordered by this court, and the contention that they are, in any realistic sense, on their way toward doing so.

The district court further found that the State's approach to desegregating TSU "has not worked and, indeed, appears to contain no prospect of working" (Pet. App. 29a). The court characterized the racial composition of TSU's student body as a "severe and

egregious" manifestation of the dualism resulting from Tennessee's unconstitutional *de jure* segregation (*id.* at 29a; see also *id.* at 33a). The court ruled that petitioners must carry out their affirmative duty to eliminate the lingering effects of the *de jure* system and that, if an open door policy alone is not sufficient to achieve that goal, "more radical remedies are required" (*id.* at 30a).

With respect to the manner in which desegregation of TSU could be accomplished, the district court observed that the evidence was uncontradicted that "white students would not be attracted to the school in any substantial numbers until there is what might be termed 'white presence' on the campus" (Pet. App. 30a). Accordingly, the court ordered petitioners to submit, by March 15, 1972, an interim plan providing at minimum for "the substantial desegregation of the faculty at TSU and the allocation to the campus of TSU of programs which will *ensure*, in the opinion of [petitioners], a substantial 'white presence' on the campus" (*ibid.*; footnote omitted, emphasis in original). The court recognized that compliance with this order would "not result in the adequate desegregation of TSU" and therefore directed petitioners also to study additional methods of desegregation and to report on such methods by August 1, 1972. In particular, the court ordered petitioners to consider "the feasibility or non-feasibility of a merger or consolidation of Tennessee State and U.T.-Nashville into a single institution" (*id.* at 31a; footnote omitted).

D. The 1977 district court findings and order

During the four and a half years following the district court's 1972 opinion, the court continued to monitor petitioners' efforts to eliminate the vestiges of *de jure* segregation at TSU and in the Tennessee higher education system. The history of this period is recounted in some detail in the court's most recent opinion (Pet. App. 44a-49a).

Petitioners filed an interim desegregation plan in March 1972, and in July and August of the same year they submitted their court-ordered reports on possible alternative methods of desegregation. UT-N stated that it believed cooperative programs with TSU were the best way to facilitate desegregation (Pet. App. 45a n.7). Petitioner in No. 79-55, the Tennessee Higher Education Commission (THEC), reported that competition with UT-N was TSU's biggest problem in attracting white students and that "[t]he only successful large scale desegregation of formerly black institutions has come by attracting adult, largely part-time commuting students, mostly enrolling in evening classes" (*id.* at 44a n.6, 54a-55a). As THEC acknowledged, this is precisely "the type of students that U.T. Nashville has been developed to serve" (*id.* at 55a). THEC concluded that, although merger of UT-N and TSU was not feasible in 1972, it "might at some point be the way to complete the desegregation process" (*id.* at 44a n.6). THEC advised that the exclusive allocation of particular educational programs, *e.g.*, teacher education, to TSU was a measure that should be taken immediately to

encourage white students to attend the nearly all-black school (*ibid.*). For its own part, TSU recommended merger with UT-N as the only way to achieve desegregation (*ibid.*).

Petitioners filed a further progress report in February 1974, and the district court found that improvements had been minimal since 1972, particularly at TSU (Pet. App. 46a). Accordingly, the court ordered petitioners to develop an interim plan for implementation during the 1974-1975 school year and a long-range plan to be submitted to the court in August 1974. The court also granted the other parties the right to offer alternative desegregation plans for consideration together with the one developed by petitioners.

In April 1974, petitioners and the State Board of Regents submitted their proposed interim plans. UT-N "reiterated [its] commitment to desegregate the Nashville area through the use of joint and cooperative programs" (Pet. App. 47a). THEC and the Board of Regents reported that the parties had been unable to reach agreement regarding exclusive program allocations or the development of cooperative programs or other joint action that would be designed to accelerate integration in Nashville. THEC and the Board therefore urged the district court to allocate one or more educational programs exclusively to TSU, beginning in the fall of 1974. The court accepted this recommendation and ordered that the offering of graduate education courses at UT-N be terminated for the next academic year and that

such courses be allocated exclusively to TSU (*id.* at 33a-36a). The court decided that any further relief should await the filing and evaluation of the long-term desegregation plans in August. The court warned, however, that its limited April 1974 order "should not be read as indicating that [petitioners] should take no further action immediately to continue the dismantling of the dual system" (*id.* at 34a).

Later in 1974, all parties filed long-range desegregation plans (Pet. App. 47a-48a). Petitioners "proposed in general that [they] continue to utilize joint, cooperative and exclusive program arrangements" (*id.* at 48a). The other plans submitted to the district court all recommended the merger of UT-N and TSU, with TSU as the surviving institution. While these plans were under consideration by the court, petitioners submitted two further progress reports describing developments subsequent to the filing of the long-range plans. On the basis of these reports, petitioners moved for summary judgment in June 1976 (*id.* at 49a). The district court denied the motion and scheduled a final evidentiary hearing.

An extensive hearing was held between September 20, 1976 and October 20, 1976. After carefully reviewing the history of the litigation and the evidence presented, the district court rendered a comprehensive opinion (Pet. App. 37a-75a), which contains the following findings:

1. "[T]he steady increase in black enrollment at the predominantly white institutions has continued" (Pet. App. 51a).

2. "Efforts to increase black faculty at these predominantly white institutions have been less productive. * * * However, the progression of black faculty since 1969 shows a small, but steady, increase" (*ibid.*).

3. "[T]he process of dismantling the dual system of higher education in Tennessee is complicated by the peculiar situation in Nashville. * * * [In 1977], over 60 years after the State's establishment of TSU as an institution for negroes and over 8 years after the Court's initial mandate to desegregate, TSU's student population is still overwhelmingly black" (*id.* at 52a-53a). Of the limited number of white students enrolled at TSU, many are "actually taking courses in off-campus centers," where more than 80% of the students are white (*id.* at 54a). By contrast to the situation at TSU, UT-N remains predominantly white, although it has grown since the filing of this suit "from a small extension program * * * to a degree-granting institution with full campus status (from 1,788 students to 5,828 students)" (*ibid*).

4. TSU and UT-N offer similar programs that "have remained predominantly one-race at each institution" (*id.* at 55a).

5. "[T]he existence and expansion of predominantly white UT-N alongside the traditionally black TSU have fostered competition for white students and thus have impeded the dismantling of the dual

system" (*id.* at 54a). "With TSU's black history and UT's prestige, this competition inevitably fosters dualism" (*id.* at 58a). As early as 1972, petitioner THEC recognized the competition for white students between TSU and UT-N (*id.* at 54a-55a).

6. "[T]he pattern of student enrollment in Nashville has been that white students have overwhelmingly enrolled at UT-N, as part-time evening students, and that black students have overwhelmingly enrolled at TSU as daytime students. This pattern of enrollment does not appear to be just coincidental but appears to be a vestige of the former state-imposed dual system of public higher education in the State of Tennessee. Moreover, even if the average student profile at UT-N shows that those students are older and are employed, these are the kind of white students that * * * TSU must attract if it is to prosper" (Pet. App. 56a).

7. During the nine years since the beginning of this litigation, petitioners' desegregation plans "have not produced the desired result" (*id.* at 58a). "From the first plan filed by [petitioners] through the Long Range Plan now in effect, [petitioners] have sought to achieve the ordered progress at TSU by utilizing certain joint and cooperative programs between UT-N and TSU * * * and by providing exclusive program assignments for the two Nashville institutions. The record clearly shows that this approach 'has not worked and, indeed, appears to contain no prospect of working'" (*id.* at 58a-59a). The factual details supporting this finding are as follows:

(a) There have been only two joint degree programs between UT-N and TSU. One, the undergraduate program in general engineering, began in 1971 and is an admitted failure. The other, the master's degree program in public administration, began in 1976, and its prospects for success are not good (Pet. App. 59a-60a).

(b) There have been no cooperative academic credit programs (*i.e.* "programs which make it easier but do not require students to take work on both campuses") involving both UT-N and TSU (*id.* at 60a).

(c) Programs exclusively assigned to TSU during the day, with UT-N being permitted to offer them only in the late afternoon and evening, have remained "overwhelmingly black at TSU * * * and predominantly white at UT-N" (*id.* at 61a). "The only truly successful exclusive program is the graduate teacher education program which was given exclusively to TSU by Court Order on April 19, 1974, because an agreement to do so could not be reached among the parties. The record shows that the exclusive graduate teacher education program at TSU is the only program which has been able to attract a substantial number of white students" (*id.* at 62a; footnote omitted).

(d) "[T]he States's approach utilizing joint, cooperative and exclusive program planning has not eliminated the competition between UT-N and TSU, and past failures leave little hope for future progress. The hope for future progress is further dimmed by

the historical inability of the defendants to agree among themselves as to the proper course of action, and by the reluctance of the politically powerful University of Tennessee to take significant steps to eradicate dualism in Nashville" (*id.* at 63a).

8. "Since joint, cooperative and exclusive programming has not resulted in progress toward eliminating the dual system in Nashville, * * * the only reasonable alternative is the merger of TSU and UT-N into a single institution under a single governing board" (Pet. App. 66a-67a).

9. Merger is feasible and is likely to occur eventually even in the absence of judicial intervention (*id.* at 67a-71a). "[T]he expert witnesses all believe that merger is an acceptable approach for desegregating the Nashville area, with most of the expert witnesses believing that merger is the best long range solution. * * * [M]ost of the expert witnesses and several of the defendant officials believe that eventually there will be one institution in Nashville. Consequently, the evidence overwhelmingly supports merging the two Nashville institutions under one governing board" (*id.* at 71a).

10. "[M]erger does not exceed what is necessary to eliminate the effect of the statutory [segregation] scheme. Eight years under the State's method is proof that a stronger remedy is required. Certainly, it cannot be argued that TSU would be overwhelmingly black today if it had not been established as an institution for negroes. Merger is a drastic remedy,

but the State's actions have been egregious examples of constitutional violations" (Pet. App. 73a).

On the basis of these findings and the entire record, the district court ordered that UT-N and TSU be merged into a single institution under the governance of the Board of Regents, the merger to be completed by July 1980. The court granted the Board of Regents 75 days within which to formulate a plan for merger, with the assistance of a six-person advisory committee, to be appointed in equal numbers by the President of TSU and the Chancellor of UT-N (Pet. App. 77a).

On May 11, 1977, the Board filed a detailed merger plan providing for the merger of TSU and UT-N by July 1, 1979. The plan was designed to establish a single public-supported institution of higher education offering a broad curriculum to both day and evening students and to accomplish this objective with maximum participation of the various constituencies involved and minimum disruption of the education process (Pet. App. 116a-117a).

The district court rejected challenges to the implementation of the Board of Regents' plan (Pet. App. 78a-81a). The court explained (*id.* at 80a-81a):

> The court purposely declined to specify the details of the merger. After determining that merger was the necessary remedy in this case, and ordering that it be done, the details were left to the educators of the Board of Regents. The plan submitted by the Board was timely filed and provides for the merger of the institutions by July 1, 1980. Consequently, it does not violate the Judgment. Absent a stay, the plan should be put into effect.

E. The court of appeals proceedings

After a thorough analysis of the district court's factual findings and remedial order, the court of appeals affirmed in all respects (Pet. App. 102a-143a). The court rejected petitioners' contention that the district court's finding of liability was based solely upon the racial composition of TSU and not upon a proper finding of an underlying constitutional violation (*id.* at 117a-118a, 123a).[1] The court of

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[1] The court stated (Pet. App. 123a):

> We conclude that the district court did not base its finding of a constitutional violation on the mere existence of one identifiably black university in the entire system. As the defendants point out, the Supreme Court held in *Swann* [v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)], the existence of a "small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law." 402 U.S. at 26. The district court in the present case did not base its finding on the existence of predominantly black TSU "in and of itself." To the contrary, Judge Gray specifically found that TSU required special attention because it was "the heart of the dual system." Further, he found that TSU continued to be predominantly black long after the open admissions policy was instituted because of a failure by state officials to take meaningful actions to facilitate its desegregation while acting with respect to UT-N in ways which impeded the required dismantling of the dual system. There was no failure to articulate the standard by which the district court determined that a constitutional violation existed in Nashville and no fatal inconsistency in his findings, as contended by the defendants.

appeals endorsed the district court's findings that TSU was the "heart" of Tennessee's *de jure* dual system and that in Nashville "the vestiges of state-imposed segregation [are] clear and undiminished in reality" (*id.* at 118a, 121a-122a). The court held that the affirmative duty to dismantle a well-entrenched dual system "applies to public higher education as well as to education at the elementary and secondary school levels" (*id.* at 119a). The court also sustained the district court's conclusion that "[w]here an open admissions policy neither produces the required result of desegregation nor promises realistically to do so, something further is required" (*id.* at 123a).

The court of appeals ruled that the merger remedy ordered by the district court is a proper exercise of the court's equitable power. The court fully considered and rejected petitioners' contention that the form of relief ordered is either unlawful or an abuse of discretion (Pet. App. 124a-130a). On the contrary, the court held, the merger remedy is consistent with the equitable principles stated in *Milliken* v. *Bradley*, 433 U.S. 267, 280-281 (1977) (*Milliken II*). Applying those principles, the court concluded (Pet. App. 125a) that

> [t]he merger remedy was related to the condition found to offend the Constitution. This "condition" was failure to dismantle a dual system. The core of the problem was found to be the inability of TSU to attract a "white presence" to its campus because of the competition of

> UT-N for students in the Nashville area. This competition would not have been so formidable if UT-N had remained a non-degree-granting extension center. Its expansion to a four-year degree-granting institution greatly inhibited the efforts to desegregate TSU. Further, the remedy of merger effectually restores the victims of discrimination to their rightful place. The black students had a constitutional right to attend a unitary system of higher education, which was denied them by state action. The merger will permit TSU to expand as a comprehensive urban university, offering educational opportunities to students of traditional college age and older working students in a desegregated setting. The nature of the remedy does not exceed the nature and scope of the violation.

Finally, the court of appeals rejected petitioners' contention that the merger order violates the principles enunciated by this Court in *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I*). The court held that the ultimate responsibility for the actions of both TSU and UT-N rests with the State of Tennessee, which operated both institutions as part of a dual system (Pet. App. 129a-130a). Accordingly, "the district court did not exceed its powers in directing that UT-N be merged with TSU even though the two institutions have been under the control of different state-wide boards" (*id.* at 129a). The court of appeals observed that both the UT Board of Trustees and the State Board of Regents have state-wide jurisdiction and therefore the concern expressed

in *Milliken I* regarding local community control over public schools is inapplicable (*id.* at 127a). Moreover, the court said, both the UT Board and the Board of Regents played a role in operating and perpetuating the *de jure* system, and for that reason an "interboard" remedy is appropriate under the standards announced in *Milliken I* (*id.* at 127a-129a).

Judge Engel agreed that the facts warranted relief but dissented from the affirmance of the remedial order merging TSU and UT-N (Pet. App. 132a-143a). He stated that in his view the appropriate relief would be "to confine UT-N to those courses and activities which were offered prior to the expansion in 1969" (*id.* at 142a). If UT-N were thus "enjoined from encroaching upon programs which are designed to attract white students," Judge Engel thought, TSU's desegregation efforts would be more likely to meet with success (*id.* at 143a).

Petitioners moved to stay the mandate of the court of appeals and to stay the merger orders. The court of appeals denied the motion, with Judge Engel dissenting from the refusal to stay the merger of UT-N and TSU. On June 18, 1979, this Court denied petitioners' request for a stay pending the filing and disposition of petitions for a writ of certiorari (Nos. A. 1026, A. 1051).

ARGUMENT

The petitions for a writ of certiorari should be denied. The decisions and concurrent findings of the lower courts correctly apply well-settled legal principles and are fully consistent with the opinions of this Court. There is no conflict among the courts of appeals on the questions presented, and further review is not otherwise warranted.

1. Petitioners argue vigorously (79-10 Pet. 17-22; 79-55 Pet. 19-21) that the district court found a constitutional violation based solely on the continued existence of a predominantly black institution. This inaccurate characterization of the district court's holding was flatly rejected by all three judges on the court of appeals panel (Pet. App. 117a-118a, 123a, 132a-134a). It does not accord with the facts.

In 1968 the district court found that Tennessee had by law created a dual system of higher education (Pet. App. 3a) that "ha[d] not been effectively dismantled" (*id.* at 5a). The court ordered petitioners to submit a plan to dismantle this dual school system, with special emphasis on the conditions at Tennessee State University (*id.* at 10a). Under this Court's decision in *Green* v. *County School Board*, 391 U.S. 430, 439 (1968), petitioners were then obliged to come forward with a plan that "promise[d] realistically to work" immediately to fulfill their "continuing 'affirmative duty to disestablish the dual school system' " of public higher education in Tennessee. *Columbus Board of Education* v. *Penick*, No. 78-610 (July 2, 1979), slip op. 10.

. Petitioners proposed to meet their affirmative constitutional duties by making indefinite promises to establish joint, cooperative, and exclusive programs between UT-N and TSU (Pet. App. 107a-108a). Four years later, the district court found that this approach had not worked and ordered petitioners to implement more effective remedies (*id.* at 29a). The ensuing five years witnessed a series of plans again limited to a generalized commitment to joint, cooperative, and exclusive programs. The plans were further hampered in their effectiveness by disagreements among the defendants. In 1977, the district court found that petitioners' expansion of UT-N since the filing of this suit "impeded the dismantling of the dual system" (*id.* at 54a). In addition, the court found that petitioners knew no later than 1972 that UT-N competes for white students with TSU and that expansion of UT-N would have the predictable effect of slowing TSU's desegregation efforts (*id.* at 54a-55a). The district court ruled again, as it had in 1972, that the dual system of education had not been dismantled and that petitioners' "past failures [left] little hope for future progress" (*id.* at 58a-59a, 63a). The court's decision to require merger thus does not rest solely on TSU's racial composition, as petitioners contend. Rather, petitioners' actions impeding desegregation and their persistent failure to meet their affirmative obligations forced the district court to adopt a remedy that will finally eliminate the unconstitutional effects of *de jure* segregation (*id.* at 73a). The court of appeals recognized

that the desegregation measures developed by petitioners were inadequate and therefore affirmed the district court's judgment in its entirety.

2. Emphasizing that TSU and UT-N are governed by different legal entities (the State Board of Regents and the UT Board of Trustees), petitioners assert (79-10 Pet. 27-31; 79-55 Pet. 22-25) that the district court erred in ordering merger of the two schools. Petitioners maintain that the district court failed to find a constitutional violation in the establishment and operation of UT-N and therefore should not have imposed a remedy involving UT-N. But this is not a case in which petitioners' liability is at issue. Both the district court and the court of appeals found that Tennessee had purposefully discriminated against black students by operating a *de jure* system of higher education including both TSU and UT-N (Pet. App. 3a-5a, 103a-104a, 129a). That finding is undisputed. Because the overwhelmingly black character of the current TSU student body is a vestige of the unconstitutional *de jure* system, the only question that remains concerns the appropriate remedy for the lingering effects of past discrimination.

UT-N cannot insulate itself from the remedial process merely by citing the different governing bodies that Tennessee has created to operate the State's system of public higher education. As the court of appeals correctly explained, the State bears the responsibility for dismantling the dual system, and it cannot relieve itself of that obligation simply by

distributing administrative authority to two or more legal entities. In the court of appeals' words (Pet. App. 129a-130a; emphasis in original):

> The Fourteenth Amendment provides that *no state* "shall deprive any person within its jurisdiction of the equal protection of the laws." It was the State, acting through its legislature, which required for many years that black persons pursuing an education in a public institution of higher education be isolated from white persons engaged in the same endeavor. The colleges and universities under the jurisdiction of the UT Board as well as those under [the State Board of Regents] were operated as part of a dual system. Both boards and all the public institutions are instrumentalities of the State. After the doors of all institutions were opened to all qualified applicants without regard to race, the effects of the previous segregation lingered. TSU remained an almost totally black university in student body, faculty and administration. Its efforts to desegregate were directly affected by competition from the expanding UT-N. Since the policies and actions of the UT Board contributed to the perpetuation of the dual system there was no legal reason why it should not be required to participate in the court-ordered plan for dismantling that system.

Contrary to petitioners' contentions, this holding is entirely consistent with this Court's relevant precedents establishing (1) the continuing affirmative duty of proven discriminators to remedy their misdeeds (see, *e.g.*, *Columbus Board of Education* v. *Penick*, *supra*; *Dayton Board of Education* v. *Brinkman*, No. 78-627 (July 2, 1979); *Green* v. *County School Board*, 391 U.S. 430 (1968)) and (2) the equitable power of the federal courts to eliminate the vestiges of *de jure* segregation (see, *e.g.*, *Milliken* v. *Bradley*, 433 U.S. 267, 280-281 (1977) (*Milliken II*)) and to prevent interference with that process (see, *e.g.*, *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484 (1972); *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972)). And, as the panel majority recognized (Pet. App. 128a), the district court's remedial order is not inconsistent with *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I*).

In the first place, it is not clear that *Milliken I* applies to the facts of this case. *Milliken I* involved an order requiring the merger of independent suburban school districts and the Detroit school system, despite the fact that the suburban districts had not engaged in any illegal discrimination and despite the lack of proof that the constitutional violations committed in the operation of the Detroit school system had had any significant effects on the suburban districts. See 418 U.S. at 745, 748; *Hills* v. *Gautreaux*, 425 U.S. 284, 294 (1976). Here, by contrast, "the State, acting through its legislature," operated TSU and UT-N as part of the *de jure* segregated system (Pet. App. 129a). Unlike the suburban school boards in *Milliken I*, the boards of TSU and UT-N are the very instrumentalities that the State employed to perpetrate the constitutional wrong. In addition, the constitutional violation affected the operations of both entities. The "inter-

board" remedy in this case is thus not comparable to the interdistrict remedy in *Milliken I*, where truly independent political entities not responsible for or affected by the constitutional violations were ordered merged.

In any event, *Milliken I* fully supports an "interboard" remedy in this case, because both TSU and UT-N committed constitutional violations in the operation of the dual system (Pet. App. 3a-5a, 103a-104a, 129a). Moreover, the actions of UT-N, both before 1960 and more recently, "have been a substantial cause" of segregation at both UT-N and TSU (*id.* at 54a-55a; see 418 U.S. at 745).[2]

3. Petitioners argue (79-10 Pet. 20-21, 22-23; 79-55 Pet. 11-16) that the Court should grant review in this case because the lower courts have ordered the merger of institutions of higher education, rather than elementary or secondary schools. But a difference between the academic levels of the institutions involved does not imply any legally significant distinction between the present case and earlier school desegregation precedents. No novel question of federal law arises from the university context.

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[2] Petitioners' contention (79-10 Pet. 24-25) that the merger order in this case is defective because the district court failed to order comparable relief in other portions of the State is without merit. Whether or not the district court could have ordered more stringent relief in the remainder of Tennessee, the remedial order actually entered was properly tailored to the unique circumstances existing in Nashville, the only location in the State where the expansion of one public university, UT-N, was found to have impeded desegregation of another, TSU.

The court of appeals correctly recognized that "a district court is controlled by general principles of equity in fashioning a desegregation remedy" (Pet. App. 124a). This Court has never suggested that those principles vary in their statement or application depending on the level of educational institution concerned. Rather, a district court framing a remedial order is required in each case to ensure (1) that the nature of the desegregation remedy fits the nature and scope of the constitutional violation (*Milliken II, supra*, 433 U.S. at 280); (2) that the remedy is designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" (*Milliken I, supra*, 418 U.S. at 746); and (3) that the remedy "take[s] into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution" (*Milliken II, supra*, 433 U.S. at 281).

Petitioners have not identified any persuasive justification for establishing different remedial rules for educational institutions above the secondary level. This Court's summary treatment of the lower courts' decisions in *Alabama State Teachers Ass'n* v. *Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd *per curiam*, 393 U.S. 400 (1969), and *Norris* v. *State Council of Higher Education for Virginia*, 327 F. Supp. 1368 (E.D. Va.), aff'd *per curiam sub nom. Board of Visitors of the College of William & Mary in Virginia* v. *Norris*, 404 U.S. 907 (1971), supports the

court of appeals' conclusion (Pet. App. 120a-121a) that the same principles apply in higher education cases. Moreover, the summary treatment of these cases belies petitioners' assertion that the "importance" of the question presented here compels review by this Court.

Petitioners' emphasis on the importance of "freedom of choice" in the higher education context (79-10 Pet. 19; 79-55 Pet. 13-14) ill suits the factual background that confronted the courts below. For decades Tennessee operated a dual system of education at all levels (Pet. App. 3a-4a). Under such circumstances, a remedial plan relying solely on "freedom of choice" presents both black and white students with a "loaded game board," cf. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971), because it places on them the burden of rectifying an ingrained tradition of prejudice produced by years of state-imposed segregation. Furthermore, the record in this case conclusively demonstrates that over a period of 17 years Tennessee's freedom of choice plan failed to dismantle the "well-entrenched" dual system of public higher education in Nashville. Cf. *Green* v. *County School Board*, *supra*, 391 U.S. at 437. The record also shows that petitioners knowingly took action that impeded desegregation efforts in Nashville and consistently failed to fulfill their obligation to implement remedies that would accomplish the required conversion to a unitary system. And, in any event, the merger remedy adopted by the district court does not restrict

any student's freedom of choice in the sense that assignment of pupils to particular schools does. Petitioners' recitation of the "freedom of choice" litany is a spurious attempt to inject into this litigation an educational policy issue that does not exist. The simple fact is that, in light of previous unsuccessful desegregation efforts, merger has been found to be the only means by which the district court can hope to eliminate the vestiges of *de jure* segregation in the public higher education system of Nashville.

4. In the final analysis, the outcome of this case depends on the accuracy of the factual findings made by the district court and approved by the court of appeals. The central feature of the court of appeals' holding is that the district court properly found that the actions of UT-N impeded the desegregation of TSU and that the unlawful segregation of TSU could be remedied only by a merger with UT-N. This Court has often stated that it will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949), and cases cited therein. See also *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). Petitioners have made no such showing here.

The merger remedy was ordered by the district court as a last resort and only after the most deliberate consideration of all the facts in the case. The district court devised its own remedy only when it became clear beyond doubt that petitioners had not

taken and would not take meaningful steps to discharge their affirmative constitutional obligations. The remedy the court adopted is analogous to the pairing of particular schools in a dual system—a remedy that has repeatedly been upheld as a proper tool of desegregation in appropriate circumstances. See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 27-29; *Green* v. *County School Board*, *supra*, 391 U.S. at 442 n.6. Here, the institutions merged offer the same basic educational programs and are located less than five miles apart. The merger remedy was tailored closely to the nature of the violation found. The court of appeals correctly held that the district court properly evaluated the evidence before it and did not abuse its discretion in entering a decree that will eliminate the lingering effects of an egregious constitutional violation.[3]

[3] In our view, the remedy suggested by the dissenting member of the court of appeals (Pet. App. 142a), which was not proposed by any party, is clearly less desirable than merger. A return of UT-N to its pre-1969 curriculum would not directly remedy the dualism in Nashville that the expansion of UT-N helped foster. Moreover, such relief would be less equitable and more disruptive than merger. In a merged institution, students in Nashville can attend the same courses previously offered, and faculty tenure and other employment interests will be honored. Neither would necessarily be the case under Judge Engel's proposal.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-10

UNIVERSITY OF TENNESSEE, et al.,

Petitioners,

v.

RITA SANDERS GEIER, et al.

No. 79-55

TENNESSEE HIGHER EDUCATION COMMISSION,

Petitioner,

v.

RITA SANDERS GEIER, et al.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

==========

BRIEF IN OPPOSITION

Raymond Richardson, Jr., et al., plaintiffs-intervenors below, respectfully request that the petitions for writs of certiorari to review the opinion of the Sixth Circuit be denied.

QUESTIONS PRESENTED

1. Whether the courts below properly found that the State of Tennessee's maintenance of Tennessee State University as a predominantly black college in Nashville and the State's competitive development of the University of Tennessee at Nashville as a predominantly white public college perpetuated an unconstitutional state created dual system of public higher education?

2. Whether the remedial order of the courts below requiring the merger of Tennessee State University and the University of Tennessee at Nashville after a decade of trying to eliminate state imposed segregation by other means was an abuse of equitable discretion?

STATEMENT OF THE CASE

A. District Court Proceedings

This action was filed in 1968 by plaintiffs Rita Geier, et al., black students, parents, faculty and citizens to desegregate the public higher education system in the State of Tennessee. Subsequently, the United States and Raymond Richardson, Jr., et al., additional black students, parents, faculty and citizens, intervened on behalf of

plaintiffs. Defendants include the Governor of the State of Tennessee and the principal State instrumentalities responsible for the operation of public higher education, viz., the University of Tennessee, the Tennessee Higher Education Commission and the State Board of Regents. The principal issue has been the remedy required to eliminate the formerly statutorily required dual system perpetuated by the continued maintenance in the city of Nashville, the State capital, of Tennessee State University (TSU) as the State's historic public college for black persons, and the competitive development of formerly all white University of Tennessee at Nashville (UT-N) as a predominantly white institution alongside predominantly black TSU.

All Tennessee public colleges were formally racially segregated pursuant to State constitutional provision and law until at least 1960. Pet. App. 103a. TSU was established in 1912 and maintained as the exclusive public institution of higher education for black persons.[1/] The Uni-

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1/ To this day, Tennessee law provides that: "The function of the Tennessee State University at Nashville shall be to train negro students in agriculture, home economics, trades and industry, and to prepare teachers for the elementary and high schools for negroes in the state." Tenn. Code Ann. §49-3206 (1977).

versity of Tennessee, on the other hand, was founded and maintained as a college solely for white persons. UT-N was established in 1947 as a non-degree granting night extension school in Nashville solely for white students who were prohibited from attending nearby TSU. Pet. App. 103a-104a. In 1968, when the action was filed, TSU had an all black faculty and student body while UT-N remained essentially all white. Pet. App. 4a-5a.

Over the course of eleven years of litigation the district court repeatedly found that "the dual system of education created originally by law has not been effectively dismantled." Sanders v. Ellington, 288 F.Supp. 937, 940 (M.D. Tenn. 1968), Pet. App. 4a-5a; Geier v. Dunn, 337 F.Supp. 573, 576 (M.D.Tenn. 1972), Pet. App. 19a; Geier v. Blanton, 427 F.Supp. 644, 651-657 (M.D.Tenn.1977), Pet. App. 52a-66a. The district court initially declined to preliminarily enjoin the expansion of UT-N (then a small non-degree granting night school) in 1968 because "[t]here is nothing in the record to indicate that the University of Tennessee has any intention to make the Nashville Center a [competitive] degree-granting day institution," Pet. App. 7a. However, defendants were repeatedly ordered to develop a workable and effective plan of desegregation for the elimination of TSU's

status as an identifiable black institution, Pet. App. 9a-12a, 29a-32a, 41a-66a, 105a-114a. These orders went unheeded, and the State expanded UT-N into a degree-granting predominantly white institution with classes beginning in the late afternoon, while TSU stagnated and remained overwhelmingly black. Id. Finally, in 1977, the district court concluded that, "[t]he Court now finds that the existence and expansion of predominantly white UT-N alongside the traditionally black TSU have fostered competion for white students and thus have impeded the dismantling of the dual system", Pet. App. 54a. The court made specific findings that the two schools were competitive institutions offering duplicative courses, that UT-N's unrestrained growth prevented TSU from attracting white students, and that the State's various joint, cooperative and exclusive programs between the two schools had failed to result in substantial desegregation of the dual system in Nashville. Pet. App. 54a-66a, 105a-114a.

On the basis of 20 days of trial (and the unanimous opinion of all the expert witnesses for the parties), the court concluded that "at this time the only reasonable alternative is the merger of TSU and UT-N into a single institution," and ordered merger no later than July 1980 under the State Board of Regents, the defendant governing

board of TSU. Pet. App. 67a, 114a.[2/] The State Board of Regents filed a plan of merger which provides "a comprehensive framework for implementation of merger," including joint TSU-UT-N implementation committees and subcommittees, timetables, and full implementation of merger in July-August 1979. Pet. App. 116a-117a. The plan, which expressly provides that UT-N's continuing education and evening programs are to continue at its downtown campus as part of TSU, was accepted by the district court. Pet. App. 117a.

B. Court of Appeals Decision

Two of the State defendants, the University of Tennessee and the Tennessee Higher Education Commission, appealed. On April 13, 1979, a majority of the court of appeals, Judges Lively and Peck, affirmed in a lengthy and comprehensive

2/ Merger was sought by all the parties plaintiff and TSU. Pet. App. 64a, 110a, 112a. Merger was opposed by defendants University of Tennessee and Tennessee Higher Education Commission, although in 1972 the Commission had reported that "a merger of Tennessee State and U.T Nashville does not appear to be feasible at the present time, although this may be necessary at some time in the future to complete the desegregation process and to eliminate duplication and overlapping of programs." Pet. App. 66a, 110a.

opinion. Pet. App. 102a. Judge Engel concurred in the affirmance of the finding of a clear underlying constitutional violation arising from the State's failure to dismantle the dual system in Nashville, but dissented on the particular remedy ordered. Pet. App. 132a-134a. Judge Engel would have vacated the judgment and remanded for further proceedings specifically for "the entry of appropriate injunctive relief to confine UT-N to those courses and activities which were offered prior to the expansion in 1969" or "[s]hould UT-N not be satisfied with this, there remains available to it the opportunity to enter into [a voluntary merger] agreement with TSU such as that which is now in effect in Memphis between UT and Memphis State University." Pet. App. 142a-143a.

On July 1, 1979 TSU and UT-N were merged.[3/]

Petitions for certiorari have been filed by defendants University of Tennessee (No. 79-10) and Tennessee Higher Education Commission (No. 79-55). Neither defendant Governor nor defendant State Board of Regents have sought review.

3/ On June 18, 1979 the full Court denied applications for a stay of the merger filed by petitioners University and Higher Education Commission. Motions to stay the merger previously had been considered and denied twice by the district court and twice by the court of appeals.

ARGUMENT

1. The petitions request the Court to review evidence and discuss specific facts, see, United States v. Johnston, 268 U.S.220, 227(1925). Petitioner's argument with the courts below is that "the mere existence of a predominantly black institution of higher education" is insufficient proof of discrimination. UT Pet. 17, THEC Pet. 19. The court of appeals, however, specifically rejected this characterization of the factual record: "This is not an accurate statement of the district court's holding . . . It was the failure of the defendants to dismantle a statewide dual system, the 'heart' of which was an all-black TSU, which was found to be a continuing constitutional violation." Pet. App. 118a, see also, 133a-134a. The related factual claim that the University of Tennessee played no role in the maintenance of Tennessee State University as a predominantly black institution, UT Pet. 27, THEC Pet. 22, was also specifically rejected by the court of appeals because "[t]he district court found that acts of the UT Board in expanding the program and size of UT-N impede desegregation of TSU and thus the dismantling of Tennessee's dual system of public higher education." Pet. App. 128a.

These factual contentions which two courts below have rejected are neither meritorious nor appropriate for certiorari. See, e.g., Blau v. Lehman, 368 U.S. 403 (1962). With respect to violation, all four judges who considered the merits below found facts supporting a finding of constitutional violation. Two courts below found that the factual record required a merger remedy; the lone dissenter would have required either a more drastic remedy, i.e, stripping UT-N of all its post-1968 expansion programs and activities, or the same remedy, i.e., providing UT-N with the opportunity to voluntarily transfer its programs to TSU. Pet. App. 142a-143a.

2. The legal standards applied by the courts below are neither novel nor remarkable. The actions of State defendants in expanding UT-N as a white alternative to TSU in the Nashville area, and the ineffective efforts taken to eliminate the prior dual system imposed by law were measured against the affirmative duty of the State to provide for effective desegregation and to desist from impeding the desegregation process. Green v. County School Board, 391 U.S. 430 (1968); Wright v. Council of City of Emporia, 407 U.S. 451, 460 (1972). These basic principles of school desegregation law were just reaffirmed in Columbus

Board of Education v. Penick, ___ U.S.___, 47 USLW 4924, 4926-4927 (July 2, 1979), affirming, 583 F.2d 787 (6th Cir. 1978), and Dayton Board of Education v. Brinkman, ___ U.S.___, 47 USLW 4944, 4947 (July 2, 1979), affirming, 583 F.2d 243 (6th Cir. 1978).

Nor is there any authority for the claim that the sum total of the State's obligation to dismantle a dual system in the field of public higher education is merely to drop formal racial bars to admission. UT Pet. 21, THEC Pet. 12. Indeed, it has long been recognized that the affirmative duty to desegregate is as exacting in public higher education, but that the means of eliminating discrimination are necessarily different when dealing with different levels of education. Norris v. State Council of Higher Education for Virginia, 327 F.Supp. 1318 (E.D. Va.), aff'd per curiam sub nom Board of Visitors of the College of William & Mary in Virginia v. Norris, 404 U.S. 907 (1971); Alabama State Teachers Assoc. v. Alabama Public School and College Authority, 289 F.Supp. 784 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 400 (1969). Compare Pet. App. 118a-123a. That the long settled principle of the affirmative duty to dismantle a dual system of public education is applied in this case to higher education does not in itself raise substantial questions. Id.

Certainly, the clear factual record in this case of purposeful state action that inevitably impeded the process of desegregation, in which all four judges below concurred, does not press the limits of any doctrine of liability.

3. The remedy of merger was ordered by the district court only after nearly a decade of litigation and repeated submission of unworkable desegregation plans by defendants. There was no abuse of equitable discretion under the facts in this case. Milliken v. Bradley, 433 U.S. 267, 280-282 (1977).[4/] Nor is the merger remedy unique or unpre-

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4/ The court of appeals held that:

> "The scope of the district court's equitable power is broad enough to encompass a merger order under the facts of this case. The court's experience taught that the only meaningful results were obtained when it ordered the graduate program in education transferred exclusively to TSU. A merger of the two institutions will involve the district court in their day-to-day affairs to a much less pervasive degree than any attempt by it to divide and allocate all the various programs to one school or the other. Merger also intrudes less into the freedom of students to attend a college of their choice than any plan which might require compulsory assignments to bring about a dismantling of the dual system. The acknowledged differences between higher education and education at the primary and secondary levels appear to

(contd.)

cedented. As both the district court and court of appeals found, the competition between preexisting Memphis State University, a predominantly white sister school of TSU, and an expanding University of Tennessee facility in another Tennessee city, Memphis, was resolved by merger of the two institutions under Memphis State. Pet. App. 56a-58a, 126a, see also 142a-143a.5/

There simply is no warrant to unravel a remedy that has provided Nashville, Tennessee for the first time with equal educational opportunity in public higher education.

4/ (cont'd)
make such frequently used remedies as assignment and transportation of students to a particular institution unworkable as well as undesirable."

Pet. App. 125a-126a.

5/ Guidelines of the U.S. Department of Health, Education and Welfare promulgated pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C §2000d, specifically approve "merging institutions or branches thereof, particularly where institutions or campuses have the same or overlapping service areas" as a desegregation device in public higher education. Revised Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658, 6661 (February 15, 1978).

CONCLUSION

The petitions for writs of certiorari filed by the University of Tennessee and the Tennessee Higher Education Commission should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-10

THE UNIVERSITY OF TENNESSEE, *et al.*,

Petitioners,

v.

RITA SANDERS GEIER, *et al.*,

Respondents.

No. 79-55

THE TENNESSEE COMMISSION OF HIGHER EDUCATION,

Petitioner,

v.

RITA SANDERS GEIER, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ORIGINAL PLAINTIFFS, RITA SANDERS GEIER, PATRICK J. GILPIN, ERNEST TERRELL, HAROLD SWEATT, and PHILLIP SWEATT, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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BRIEF OF ORIGINAL PLAINTIFFS, RITA SANDERS GEIER, PATRICK J. GILPIN, ERNEST TERRELL, HAROLD SWEATT, and PHILLIP SWEATT, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported as *Geier v. University of Tennessee,*

597 F.2d 1056 (6th Cir. 1979). The opinions of the District Court in this case are reported as *Sanders v. Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968); *Geier v. Dunn*, 337 F.Supp. 573 (M.D. Tenn. 1972); and *Geier v. Blanton*, 427 F.Supp. 644 (M.D. Tenn. 1977).

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly concluded that the District Court correctly exercised its discretion in ordering the merger of TSU and UT-N to remedy Tennessee's *de jure* constitutionally violative dual education system.

2. Whether a writ of certiorari should not issue because the merger remedy devised and affirmed by the lower courts is constitutionally sound.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action to desegregate the dual system of public higher education maintained by the State of Tennessee

was filed in the United States District Court for the Middle District of Tennessee in 1968. The issue in contention then, as now, is the remedy required by the Fourteenth Amendment to eliminate the dual system of formerly all-black Tennessee State University (hereinafter TSU) maintained alongside the formerly all-white, now predominately white, University of Tennessee at Nashville (hereinafter UT-N).

Litigation has been protracted for eleven years. The District Court found in 1968 that Tennessee had failed to eliminate the state-wide *de jure* system of racial segregation in higher education. *Sanders v. Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968). Spanning a decade, the District Court repeatedly ordered the Appellants to desegregate the public education system. See *Geier v. Dunn*, 337 F.Supp. 573 (M.D. Tenn. 1972); *Geier v. Blanton*, 427 F.Supp. 644 (M.D. Tenn. 1977). Following 20 days of trial, the Court concluded in 1977 that, because the Appellants' approach to dismantling the system had neither worked nor contained any prospect of working, "the only reasonable alternative is the merger of TSU and UT-N into a single institution" by July 1980. Subsequent thereto, Appellants were three times denied stays of the District Court's merger orders.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's ruling. *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979). Judge Engel's limited dissent concurred in all the majority's holdings except the affirmance of the remedial order to merge. Appellants were denied a stay by the Court of Appeals for the Sixth Circuit before and after its ruling.

This matter comes before this Court upon Appellants' petitions for a writ of certiorari to the Court of Appeals

for the Sixth Circuit following this Court's denial to stay the mandate of the District Court and judgment of the United States Court of Appeals for the Sixth Circuit rendered April 13, 1979. This brief is in opposition to both the petition for a writ of certiorari filed in *University of Tennessee v. Rita Sanders Geier, et al.*, No. 79-10 (July 3, 1979), and the petition for a writ of certiorari filed in *Tennessee Higher Education Commission v. Rita Sanders Geier, et al.*, No. 79-55 (July 13, 1979).

ARGUMENT OPPOSING WRIT OF CERTIORARI

I.

THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE DISTRICT COURT CORRECTLY EXERCISED ITS DISCRETION IN ORDERING THE MERGER OF TSU AND UT-N TO REMEDY TENNESSEE'S *DE JURE* CONSTITUTIONALLY VIOLATIVE DUAL EDUCATION SYSTEM.

A.

Tennessee has failed to fulfill its affirmative duty to desegregate public higher education.

Tennessee has an affirmative duty to dismantle its statutory dual system. The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy has been to dismantle the dual school systems.

> Where a dual education system was authorized by state law at the time of *Brown I*, finding state action presents no serious problem. The state automatically assumes an affirmative duty "to effectuate a transition to a racially non-discriminatory school system" . . . by eliminating "all vestiges of state-imposed segregation." *NAACP v. Lansing Board of Eucation*, 559 F.2d 1042, 1045 (6th Cir. 1977), *cert. denied*, 434 U.S. 997 (1977) (citations omitted).

Defendants' efforts to impede the orderly dismantling of Tennessee's dual educational system have permitted UT-N to siphon off white students who normally would have desegregated TSU. Contrary to Defendants' claim that this is a case of *de facto* segregation, the case exhibits a classic *indicium* of *de jure* segregation—a state-imposed statutory segregation consistently maintained by the actions of state officials.

For over ten years the University of Tennessee has been unable to demonstrate extraordinary reasons to justify the issuance of a writ of certiorari. As the Court held in *Keyes v. School District No. 1*, 413 U.S. 189 (1973), where a school board was found to have deliberately segregated the school system with cumulative violations of the equal protection clause, school authorities have an affirmative duty to effectuate a transition to a racially non-discriminatory school system. The lower courts have consistently found the *de jure* segregation of higher education in Tennessee to be a violation of the United States Constitution. Granting certiorari, then, would only perpetuate the unconstitutional dual system of education. The citizens of Tennessee must no longer have to endure such discrimination. The "devastating, often irreparable, injury to those children who experience segregation and isolation was noted (24) years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954)." *Jefferson Parish School Board v. Dandridge, supra*, 404 U.S. 1219, 1220 (1971). The irreparable injury of discrimination is equally conclusive

on black college students attending TSU. Appellants' arguments opposing merger are insufficiently substantive to warrant the grant of certiorari.

> The rights of children to equal educational opportunities are not to be denied, even for a brief time, simply because a school board situates itself so as to make desegregation difficult. *Jefferson Parish School Board v. Dandridge, supra,* 404 U.S. 1219, 1220 (1971).

After protracted litigation for over ten years, the University of Tennessee and the Tennessee Higher Education Commission must obey the constitutional mandate to desegregate. The dual system of Tennessee public higher education must be dismantled in the public interest.

B.

The merger order is within the equitable power of the District Court and is a remedy tailored to dismantle the constitutionally violative dual education system.

The District Court exercised its inherent powers to fashion an equitable remedy for eliminating *de jure* segregation in Tennessee public higher education. The scope of such "equitable powers to remedy past wrongs is broad," *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. 1 (1971), and its ruling is entitled to substantial deference. *Aberdeen and Rockfish Ry. Co. v. SCRAP,* 409 U.S. 1207 (1972). Appellants twice suffered adverse lower court rulings. Appellants' failure to substantiate their claim clearly shows that a presumption in favor of the lower courts' rulings is warranted. Thus, the remedy devised and affirmed by the lower courts is entitled to substantial deference.

> [A] school desegregation case does not differ fundamentally from other cases involving the forming of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. 1, 15-16.

The merger order was a necessary and appropriate decree to put an end to the racial discrimination statutorily practiced in Tennessee public higher education. School desegregation remedies must be designed to redress the segregative effect of the constitutional violations. *Dayton Board of Education v. Bunkerman,* 433 U.S. 406 (1977). As in *Milliken v. Bradley,* 433 U.S. 267 (1977), the remedy here does not "exceed" the violation since the remedy is tailored to cure the "condition that offends the constitution." The merger of TSU and UT-N was ordered to eliminate all vestiges of state-imposed segregation becase they violate constitutional guarantees of Equal Protection. Since it is possible to identify a "white school" or a "negro school," a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown. *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. 1, 19. See *Wright v. Council of City of Emporia,* 407 U.S. 451, 465 (1972). Despite minimal improvements in integrating TSU and UT-N, Petitioners have failed to rebut a *prima facie* case of racial discrimination.

A remedy greater than the court-order desegregation plans in *Sanders v. Ellington,* 288 F.Supp. 937 (M.D. Tenn. 1968), and *Geier v. Dunn,* 337 F.Supp. 573 (M.D. Tenn. 1972), is required to satisfy the constitutional mandate to create a unitary, non-racial public

higher education system in Tennessee. As the Court found in *Green v. County School Board*, 391 U.S. 430 (1968), a plan utilizing freedom of choice to desegregate a dual, racially segregated school system is not an end *per se*, but is only a means to a constitutional mandated end—the abolition of all vestiges of segregation. The *Green* court concluded that the plan is acceptable if effective, but if insufficient to eliminate segregative effects, other means must be used to attain this end. The merger order is a remedy designed to eliminate the discrimination inherent in Tennessee's statutorily created dual system of education.

II.

A WRIT OF CERTIORARI SHOULD NOT ISSUE BECAUSE THE MERGER REMEDY DEVISED AND AFFIRMED BY THE LOWER COURTS IS CONSTITUTIONALLY SOUND.

A.

Both lower courts have found Appellants to be maintaining a dual system of education violative of the United States Constitution.

Both the District Court and the Court of Appeals after careful consideration concluded that the unconstitutional segregation maintained in Tennessee's higher education must be remedied by a merger of UT-N and TSU. Appellants were obliged to dismantle the dual school system by setting up joint, cooperative, and exclusive programs between TSU and UT-N. Appellants failed to meet their affirmative duty, thereby requiring the District Court, after repeated admonishments, to fashion its own remedy. The Court of Appeals substantiated all the District Court's findings of fact and conclusions of law:

> (1) The district court did not err in holding that the defendants have an affirmative duty to dismantle the dual system of public higher education which heretofore existed in Tennessee; (2) the district court did not err in holding that the open admissions policy instituted in 1960 failed to dismantle the dual system; (3) the district court did not err in holding that the defendants are required to take affirmative steps to complete dismantling the dual system; (4) the district court did not err in finding that the existence of an expanding UT-N in close proximity to TSU has impeded the progress of desegregating TSU and of dismantling the dual system; (5) the district court did not exceed its equitable power or impose an inappropriate remedy in ordering merger of UT-N and TSU under the governing authority of SBR [State Board of Regents]. *Geier v. University of Tennessee*, 497 F.2d 1056, 1071 (1979).

Pursuant to Rule 19(1)(b), Rules of the Supreme Court of the United States, this Court should pay particular attention to the Court of Appeals' appraisal of the central issue upon which this petition for a writ of certiorari pivots:

> The Fourteenth Amendment provides that *no state* "shall deprive any person within its jurisdiction the equal protection of the laws." [T]he State . . . required for many years that black persons pursuing an education be isolated from white persons engaged in the same endeavor. The colleges and universities under the jurisdiction of the UT Board as well as those under SBR were operated as part of a dual system. Both boards and all the public institutions are instrumentalities of the State. After the doors of all institutions were opened to all qualified applicants without regard to race, the effects of the

previous segregation lingered. TSU remained an almost totally black university in student body, faculty and administration. Its efforts to desegregate were directly affected by competition from the expanding UT-N. Since the policies and actions of the UT Board contributed to the perpetuation of the dual system there was no legal reason why it should not be required to participate in the court-ordered plan for dismantling that system. *Geier v. University of Tennessee*, 497 F.2d 1056, 1070-71 (1979).

B.

A long history of Supreme Court precedents to eliminate dual systems of education has standardized the issues at bar.

The University of Tennessee wrongly contends that the issues in the instant case are unique. This futile attempt to obtain a writ of certiorari must be rejected in light of the case law on *de jure* segregation. The Supreme Court has long held that the Fourteenth Amendment forbids racial discrimination in higher education. *Norris v. State Council of Higher Education for Virginia*, 327 F.Supp. 1368 (E.D. Va.), *aff'd per curiam sub nom. Board of Visitors of the College of William & Mary in Virginia v. Norris*, 404 U.S. 907 (1971) (citations omitted). In *Norris* the District Court enjoined the expansion of a predominantly white college because the state had an affirmative duty to convert the dual system of higher education to a unitary system eliminating racial discrimination. See *Green v. County School Board*, 391 U.S. 430 (1968); *Alabama State Teachers Association v. Alabama Public School and College Authority*, 389 F.Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393

U.S. 400 (1969). *See also* the United States Department of HEW's approval of the merger remedy for desegregating public education, U.S. Dept. of HEW, *Revised Criteria Specifying Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education*, 43 Fed. Reg. 6658 (Feb. 15, 1978). The contention that *de jure* segregation practiced in Tennessee is somehow different from segregation elsewhere is without merit.

Contrary to Appellants' assertion, the Court of Appeals' holding is apposite to *Milliken v. Bradley*, 418 U.S. 717 (1974). In *Milliken*, the Supreme Court held that the District Court's remedy to eliminate *de jure* segregation was permissible where the record established unconstitutional racial discrimination. Thus, the remedy in the instant case need not be limited since the record provides sufficient evidence that the remedial order was justified and applicable to Appellants.

Pursuant to Rule 19, Rules of the Supreme Court of the United States, Petitioners are unable to provide even one special and important reason for the Supreme Court to grant certiorari. There exists no conflict between the decision of the lower courts and previous decisions on the same issue by the Supreme Court. Furthermore, the affirmation of the Sixth Circuit Court of Appeals is not in direct conflict with decisions of other Courts of Appeals. Nor is there any conflict between this Sixth Circuit decision and any other Sixth Circuit decision. Finally, earlier holdings of *Geier v. Blanton*, 427 F.Supp. 644 (M.D. Tenn. 1977), *aff'd sub nom. Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979), conform to all Supreme Court decisions on this issue.

McLaughlin v. Florida, 379 U.S. 184 (1904), a case relied upon by Petitioners, declares that the central

purpose of the Fourteenth Amendment of the United States Constitution was to eliminate racial discrimination emanating from official sources in the States. The order to merge UT-N into TSU is a remedy designed to achieve this end.

CONCLUSION

For the above reasons, the Petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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OCTOBER TERM, 1978

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Respondents.

No. 79-55

TENNESSEE HIGHER EDUCATION COMMISSION,
Petitioner,

v.

RITA SANDERS GEIER, *et al.*, UNITED STATES OF AMERICA, RAYMOND RICHARDSON, JR., *et al.*,
Respondents.

RESPONSE OF STATE BOARD OF REGENTS TO PETITION(S) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner,

v.

RITA SANDERS GEIER, *et al.*, UNITED STATES OF AMERICA, RAYMOND RICHARDSON, JR., *et al.*,

Respondents.

RESPONSE OF STATE BOARD OF REGENTS TO PETITION(S) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent, State Board of Regents, State University and Community College System of Tennessee prays that a Writ of Certiorari not issue to review the

judgment of the United States Court of Appeals for the Sixth Circuit entered on April 13, 1979, requiring a merger of Tennessee State University (hereinafter referred to as "TSU") and the University of Tennessee at Nashville (hereinafter referred to as "UT-N.")

OPINIONS BELOW

The opinions of the District Court in this case are reported as *Sanders v. Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968); *Geier v. Dunn*, 337 F.Supp. 573 (M.D. Tenn. 1972); and *Geier v. Blanton*, 427 F.Supp. 644 (M.D. Tenn. 1977).

The opinions of the Court of Appeals requiring the merger and the denials of stay applications are not at this date officially reported. Copies of such opinions however can be found to the Appendix to the Petition for a Writ of Certiorari of the University of Tennessee and/or Tennessee Higher Education Commission.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1979. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action was originally commenced in May of 1968 when the plaintiffs[1] sought the exercise of the injunctive powers of the District Court to enjoin the construction of a new complex to house UT-N on the legal theory that the construction, in a choice area of downtown Nashville, would further continue and strengthen a separate/dual and inferior system of higher education by the State of Tennessee for its Black citizens.

Thereafter the District Court denied the injunctive relief sought by the plaintiffs but concurrently found a dual system of higher education existed in the State of Tennessee. *Sanders v. Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968). At that time the District Court was of the opinion that the construction of the new complex to house UT-N ". . . would not necessarily perpetuate a dual system of higher education, but, rather might play a part in the furthering of the unitary system." (Finding of Fact No. 6, supra, 288 F.Supp. 937, 941.)

The District Court having found in 1968 a dual system of higher education, has subsequently proceeded to judicially mandate its dismantling through various orders discussed hereafter.

By as early as April 1970, the District Court in *Geier v. Dunn*, 337 F.Supp. 573 (M.D. Tenn. 1972) found that TSU had a student body of 99.7% Black and a corresponding 81% Black faculty; the State as a whole, except for TSU, was proceeding to dismantle the dual system; and the process used for achieving desegregation was not working at TSU and little reason existed to believe it would.

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[1]The parties during the "Statement of Case" will be referred to as they appeared in the District Court.

TSU was created by the General Assembly of the State of Tennessee as the State's sole Black institution of higher education in 1909; the college opened its doors in 1912 as Tennessee Agricultural and Industrial State Normal School for Negroes and subsequently received its present name pursuant to an Act of the Tennessee General Assembly. The racial requirement of being Black was removed as a prerequisite of admission to TSU in 1960. While TSU is historically an institution of higher education catering to Blacks, the university has been in theory a multi-racial institution for nineteen years.

Initially, the District Court adopted UT-N's argument that it was primarily a non-degree granting night school, whereas TSU operated a degree-granting daytime facility (288 F.Supp. 941). The District Court seeking to remedy the TSU "phenomenon" of 99.9 percent Black freshmen during the academic year 1970-71, on February 3, 1972, ordered that the defendants submit a plan to desegregate TSU and to consider the feasibility or non-feasibility of curriculum consolidation of undergraduate and graduate programs offered by the State's colleges in the general Nashville area. *Geier v. Dunn,* 337 F.Supp. 573 (M.D. Tenn. 1972)." 427 F.Supp. 644, 647.

In obedience to the February 3, 1972 Order a Plan was submitted by defendants; however, the United States, an intervenor, and plaintiffs took exception to its terms and conditions.

On July 31, 1972, Raymond Richardson and others as Black students, parents and faculty associated with TSU filed a motion to intervene; the Motion was granted on February 23, 1973. Concurrently the intervenors sought an injunction against the proposed creation of

campuses for Shelby State Community College in Memphis, Tennessee, on the ground that such action would result in racially segregated community college campuses.

Thereafter periodic progress reports on the desegregation activity in Tennessee's state maintained colleges and universities were filed with the Court. Concurrently, proposals providing that certain graduate and undergraduate programs would be offered exclusively at UT-N or TSU, or by some joint or cooperative method whereby TSU would be an essential and integral educational element, were proposed by the defendants Tennessee Higher Education Commission and the State Board of Regents. The University of Tennesse, however, according to the District Court resisted all attempts to diminish its role in Nashville whether the same were Court inspired or the handiwork of another state body with statutory responsibilities in higher education.

The Tennessee Higher Education Commission is a body created by statute for the purpose of coordinating the planning and financing of higher education in Tennessee. The State Board of Regents of the State University and Community College System, Tennesssee is the governing body charged by statute with the operation of the community college and regional university system, of which TSU is a part, and of which the University of Tennessee is not. The Board of Trustees of the University of Tennessee is the governing body charged by statute with the operation of the University of Tennessee and its auxiliary campuses and educational enterprises at Knoxville, Chattanooga, Tullahoma, Nashville, Memphis and Martin.

In the District Court's Order of February 15, 1974 the defendants were directed "to submit on or before August 1, 1974, a long range plan for desegrating Ten-

nessee's public institutions of higher education; the Court also granted all other parties the right to submit a plan or suggestion by the same date." 427 F.Supp. 644, 648. The defendant's long range plan was submitted July 21, 1974.

In addition, "[O]n or about July 31, 1974, the plaintiff-intervenors, Raymond Richardson, et al., filed the "Plan for the Dismantling of Tennessee Dual System of Public Higher Education," in which the plaintiff-intervenors established goals and timetables for black student enrollment, the employment of black faculty and administrators and the desegregation of Tennessee's higher education governance structure. With respect to the Nashville area, the intervenors, Raymond Richardson, et al., proposed that UT-N be absorbed by TSU." 427 F.Supp. 644, 649.

Thereafter numerous progress reports were filed with the District Court citing "the progress or lack thereof, achieved since the submission to the Court of the long Range Plan, which Plan had been supplemented by the defendants." 427 F. Supp. 644, 648.

In June of 1976, the defendants filed a Motion for Summary Judgment, "on the sole basis of the progress shown in their Desegregation Progress Report." 427 F. Supp. 644, 649. The Motion was denied and the trial was had from September 20, 1976 to October 20, 1976. (427 F.Supp. 644, 648-649).

The issue at trial was "whether the defendants . . . met the constitutional duty to dismantle the dual system of public higher education in Tennessee." 427 F.Supp. 644, 650.

The District Court in its Memorandum Opinion and Order filed on January 31, 1977 divided its opinion

into two areas of concern—(1) Long Range Desegregation Plan, and (2) the remedy for the Nashville/TSU phenomenon.

The District Court found the TSU problem to be an element of a state-wide scheme which evidenced:

> (1) ". . . regular progression of black enrollment (in historically white state-supported institutions of higher education) in terms of percentages of total enrollment:" 427 F.Supp. 644, 650, and
>
> (2) ". . . the predominatly white institutions are continuing to make steady progress, . . . (in achieving the dismantling of the dual system of higher education found to exist)" 427 F. Supp. 644, 651.

Addressing itself to the "peculiar situation in Nashville," the District Court determined "that the existence and expansion of predominantly white UT-N alongside the traditionally black TSU has fostered competition for white students and thus . . . impeded the dismantling of the dual system." 427 F.Supp. 644, 652.

The basis for such determination lay in the District Court's finding that:

> (a) Comparative/common educational programs both at UT-N and TSU remain predominantly one race at each institution." 427 F.Supp. 644, 652.
>
> (b) Programs of UT-N and TSU of a "joint or cooperative nature have had no appreciable impact on the desegregation of TSU." 427 F. Supp. 644, 655.
>
> (c) Programs allocated by the time of day in which they are offered, *i.e.,* day courses at TSU, night classes at UT-N are "overwhelmingly black at TSU . . . and predominantly white at UT-N . . . " 427 F.Supp. 644, 653.

(d) The "exclusive graduate teacher education program at TSU is the only program which has been able to attract a substantial number of white students." 427 F.Supp. 644, 655.

(e) Lastly, "joint, cooperative and exclusive programming has not resulted in progress toward eliminating the . . . dual system in Nashville . . . " 427 F.Supp. 644, 657.

Predicated upon the above the District Court found "that the only reasonable alternative is the merger of TSU and UT-N into a single institution under a single governing board." In arriving at the decision to merge the two institutions, Judge Gray noted that "merger under the Board of Regents" would be appropriate because of the "other three State institutions of higher education in Middle Tennessee are under this Board. Any problems of competition or duplicative programs can obviously best handled by one governing body." 427 F.Supp. 644, 660.

Concurrently with the decision to place the merged institution under the Board of Regents, the District Court noted "[F]or the Board of Trustees of UT to take over the merged institution would mean the elimination of TSU as an education institution with all the concomitant losses entailed therein." 427 F.Supp. 644, 660.

Inherent in the District Court's decision on the side of merger of UT-N into TSU under the Board of Regents was the fact that during September 20 through October 20, 1976 hearing the "expert witnesses all believe[d] that merger is an acceptable approach for desegregating the Nashville area, with most of the expert witnesses believing that merger is the best long range solution." 427 F.Supp. 644, 659.

Pursuant to the District Court's Judgment of February 28, 1977, the State Board of Regents submitted by May 16, 1977, seventy-five days after Judgment, a Plan of Merger formulated by "an advisory committee consisting of six persons, three to be named by the President of TSU and three to be named by the Chancellor UT-N." 427 F. Supp. 644, 661.

The University of Tennessee and the Tennessee Higher Education Commission appealed the decision of, now deceased, U.S. District Judge Frank Gray, Jr. to the United States Court of Appeals for the Sixth Circuit; and in particular, that portion of the Order mandating the two institutions be merged and that the Board of Regents' Plan of Merger, as submitted, be implemented. In an opinion written by Circuit Judge Lively, which was filed on April 13, 1979, the Court of Appeals affirmed the District Court's action; Circuit Judge Ingle dissenting. Stripped to its core, the Circuit Court determined that the "findings of the district court on the actions and inactions by the defendants are supported by substantial evidence and are not clearly erroneous. The conclusion that these actions and failures to act constitute a violaof the Constitutional duty to dismantle a dual system of public higher education is in accord with the pronouncements of the Supreme Court from *Brown II* to the present time." (UT Writ Appendix, p. 123a)

"Both the UT Board and the SBR have statewide jurisdiction over their respective systems." (UT Writ Appendix, p. 127A) The Court therefore concluded that:

> "Since the policies and actions of the UT Board contributed to the perpetuation of the dual system there was no legal reason why it should not be required to participate in the Court-ordered Plan for

dismantling that system." (UT Writ Appendix, p. 130a)

It is to have this decision (Case No. 77-1621, 1623, and 1625) of the U.S. Court of Appeals for the Sixth Circuit reviewed that the petitioners University of Tennessee and Tennessee Higher Education Commission pray that a Writ be issued.

REASONS FOR NOT GRANTING WRIT

At this time, the merger of the University of Tennessee at Nashville into the surviving Tennessee State University is an accomplished fact. Acceptance by students, faculty, as well as the Nashville community for the merged institution will be further advanced by the termination of this more than decade old litigation.

The legal issues raised in the respective petitions filed by the Tennessee Higher Education Commission, and more particularly, the University of Tennessee have been resolved by this Court in *Dayton Board of Education, et al. v. Brinkman, et al.*, ___ U.S. ___, 47 LW 4945 (unofficially), and *Columbus Board of Education, et al. v. Pennick, et al.*, ___ U.S. ___, 47 LW 4924 (unofficially), adversely to the contentions argued by petitioners. Petitioner University of Tennessee in discussing *Dayton, supra* and *Columbus, supra,* throughout its petition (obviously prepared prior to this Court's publication of two mentioned decisions) termed the appealed from decisions of the Sixth Circuit, in each instance, as a deviation "from the principles of Constitutional law enunciated by this Court, and *such deviation cannot be permitted to stand as the law of this case,* particularly in view of its importance to the persons involved and its broad public importance." (UT Petition for Writ of Certiorari, p. 17.) (Our emphasis.)

This Court having sustained in each instance the decision of the Sixth Circuit, cited by the University of Tennessee as a case where the Circuit had "clearly deviated from the principles of Constitutional law enunciated by this Court," the Petitions are obviously now moot.

The "nub of the argument" advanced by the University of Tennessee is that no finding existed below, that the University of Tennessee engaged in actual and culpable discrimination, and as such no system-wide impact exists and, *ergo,* no system-wide remedy is applicable and/or equitably available. As authority the University of Tennessee places exclusive reliance upon this Court's Opinion in the first round of *Dayton Board of Education, et al. v. Brinkman et al.*, 433 U.S. 406 (1977).

On remand in *Dayton,* the District Court (446 F.Supp. 1232 S.D. Ohio) found that the "plaintiffs had failed to show either discriminatory purpose or segregative effect or both, with respect to the challenged practices and policies. . . " (47 LW 4945). The Sixth Cirucit reversed (583 F.2d 243), indicating "that at the time of *Brown I,*[2] the Dayton Board was operating a dual system, that it was constitutionally required to disestablish that system and its effects, that it had failed to discharge this duty and that the consequences of the dual system, together with the intentionally segregative impact of various practices since 1954, were of systemwide import and an appropriate basis for a system-wide remedy." 47 LW 4946. It is this decision of the Sixth Circuit which the University of Tennessee would lead this Court to believe "does violence to the very carefully articulated rationale"

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[2] *Brown v. Board of Education* 347 U.S. 483 (1954).

of this Court's 1977 Opinion in *Dayton I.* (UT Petition for Writ, p. 22)

Neither the University of Tennessee nor the Tennessee Higher Education Commission argue in this cause that a dual system did not in fact exist statewide prior to 1954 and that it was continued after *Brown I* until 1960 by operation of State statute in both the University of Tennessee and State Board of Regents[3] respective systems. As noted in *Dayton, supra,* and as applied to this cause, petitioner University of Tennessee and respondent State Board of Regents were after "1954 . . . under a continuing duty to eradicate the effects of that system . . . and that . . . prima facie proof that current segregation was caused at least in part by prior intentionally segregative official acts" (47 LW 4947) would give rise to systemwide relief.

It is abundantly clear from the record in this cause that the underlying problem in Nashville, which resulted in TSU being predominantly Black and UT-N predominantly white, had its genesis in the dual system of higher education in Tennessee created by statute prior to 1960; a fact the District Court found to exist. Thus having made that factual determination—which is not challenged by either petitioner as clearly erroneous—District Judge Gray properly exercised his equitable powers and mandated the merger of the two institutions; for as the Circuit Court noted, "If the situation in Nashville were remedied, there would be promise of greater progress throughout the system." (UT Writ Appendix, p. 130a)

The July 2, 1979 opinions of this Court in *Dayton, supra* and *Columbus, supra* are dispositive of all issues

[3]Then known as State Board of Education.

raised by petitioners and mandate that a Writ of Certiorari not issue in either case.

Further, the public will and tranquility, as well as the furtherance of academic intercourse on the respective campuses, will be served by the denial of each Petition.

CONCLUSION

For the above reasons, a Writ of Certiorari should not issue to review the Judgement and Opinion of the United States Court of Appeals for the Sixth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-10

THE UNIVERSITY OF TENNESSEE, *et al.*,

Petitioners,

v.

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Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

Pursuant to Rule 24(4) of this Court, the Petitioners, The University of Tennessee, its President, Edward J. Boling, the Board of Trustees of The University of Tennessee, the present members of the Board of Trustees and its Vice-Chairman, respectfully submit this Reply Brief for this Court's consideration with respect to their Petition for the Writ of Certiorari heretofore filed with this Court and presently pending disposition.

As of the date that this Reply Brief was prepared by Petitioners' counsel, the United States' Brief in opposition to their Petition had not been filed with the Court. Accordingly, Petitioners respectfully reserve the right to submit a Reply Brief in response to the Government's Brief in opposition, if such a response is appropriate.

It must be observed, prior to replying to certain of the arguments made by the Respondent, State Board of Regents, State University and Community College System of Tennessee, that those arguments should be considered in the light of the contrary position which it took in the District Court. The State Board of Regents joined with this Petitioner and the Petitioner, Tennessee Higher Education Commission, in formulating the Long-Range Plan for dismantling the dual system of higher education in Tennessee and fully supported that Plan in the trial of this action in the District Court. That Plan rejected merger as a solution and, instead, provided that certain course offerings would be allocated exclusively to UTN or TSU while certain other courses would be offered jointly and cooperatively by the two institutions. This Plan was submitted to the District Court by the State Defendants as a proper remedy for achieving further desegregation at both institutions. During the trial in the District Court, the State Board of Regents opposed merger as a remedy, and its Chief Executive Officer, Chancellor Roy Nicks, testified that he was committed to the Long-Range Plan and that, in his opinion, implementation of that Plan would satisfactorily eliminate existing racial imbalance in the State's system of higher education. (Appendix before Court of Appeals, pp. 1520, 1521). The State Board of Regents did not advocate merger until the District Court ordered a merger under that Board's jurisdiction. Since that time it has reversed its prior position and become an

advocate of merger in an obvious effort to protect the proprietary interest which it has acquired in the facilities, resources, faculty and students of what was formerly UTN.

Petitioners are compelled to respond to the contention advanced in the Response filed in this matter by the State Board of Regents to the effect that "the legal issues raised in the respective Petitions filed by the Tennessee Higher Education Commission and, more particularly, The University of Tennessee have been resolved by this Court in *Dayton Board of Education, et al v. Brinkman, et al,* ___ U.S. ___, 47 L.W. 4945 (unofficially), and *Columbus Board of Education, et al v. Penick, et al,* ___ U.S. ___, 47 L.W. 4924 (unofficially), adversely to the contentions argued by Petitioners." (p. 10, Brief of State Board of Regents).

The argument advanced is that because, among other arguments presented in their Petition filed in this matter, the Petitioners raised the question of whether the decisions of the United States Court of Appeals for the Sixth Circuit in those two cases conflicted with prior decisions of this Court, the issues involved in this case were somehow "resolved" by this Court's disposition of those cases. The fallacy of this assertion becomes readily apparent upon an examination of those two opinions and a consideration of the important differences between the factual and legal issues involved in those cases and those presented by this Petition.

The most obvious distinction between the factual and legal issues dealt with by this Court in the *Dayton* and *Columbus* cases and those presented by the instant case is that while those cases were concerned with public systems of elementary and secondary school education, The University of Tennessee at Nashville (UTN) and Tennes-

see State University (TSU) are institutions of higher education whose doors are open to all students. It is utterly unrealistic to contend that there is no distinction, for purposes of determining whether there has been a violation of the Fourteenth Amendment, between the analytical approach which must be taken with respect to colleges and universities whose students are free to attend the institution of their choice and that approach which is appropriate with respect to elementary and secondary school education where educational authorities can and necessarily do control the racial balance of particular schools by establishing geographical attendance zones, controlling transfer policies, assigning teachers and promulgating various policies which have a practical effect upon what schools particular students will attend.

Further, any reasonable reading of the language of this Court's Opinions in the *Dayton* and *Columbus* cases discloses that those decisions do not represent a departure from established precedent. Nothing in either of those decisions is inconsistent with the arguments advanced by the Petitioners.

Respondent apparently interprets the *Dayton* and *Columbus* decisions as justifying whatever remedies the District Court determines to be necessary to correct racial imbalance where it is shown that at one time, however remotely in the past, *de jure* segregation was practiced by school officials within a particular state and there remains racial imbalance in any given school within that state. Further, it is apparently Respondent's position that these two decisions not only justify the imposition of a remedy but that the mere existence of such a situation justifies the imposition of a remedy against a school within a separate system of education from that within which the Constitutional violation was found to exist. Such an interpre-

tation is a marked departure from the teachings of this Court's prior decisions regarding the prerequisites for finding a Constitutional violation and the proper limitations upon the District Court's authority to fashion a remedy. It is respectfully submitted that a correct reading of *Dayton* and *Columbus* refutes Respondent's interpretations.

In the *Columbus* case the District Court found that school officials had been guilty of conduct which was intended to and did promote racial segregation, and the Court of Appeals made a similar finding in the *Dayton* case. *Columbus Board of Education v. Penick*, 99 S. Ct. 2941, 2948-2950 (1979); *Dayton Board of Education v. Brinkman*, 99 S. Ct. 2971, 2980 (1979). Further, in the *Columbus* decision, this Court expressly reiterated the principle that a racially discriminatory impact *per se* is not sufficient to establish that the Fourteenth Amendment has been violated, absent a showing of purposeful discriminatory conduct and that the existence of an intent to discriminate may not properly be inferred from the fact that particular acts have a racially discriminatory impact. *Columbus Board of Education v. Penick, supra* at 2950.

In the instant case neither the District Court nor the Court of Appeals found that the construction and operation of UTN was motivated by any discriminatory purpose, nor was there a finding of any intentionally discriminatory conduct on the part of any state official with respect to the operation of either of Tennessee's systems of higher education. On the contrary, as pointed out and discussed in more detail in the Petition filed in this case, the District Court expressly found, in its 1968 Opinion, that State officials had not been guilty of "Constitutionally impermissible acts", either presently or in the recent past, and, further, found that the motivation for the

expansion and operation of UTN was to provide educational opportunities "for employed persons of all races who must seek their education at night". *Sanders v. Ellington*, 288 F. Supp. 937, 940, 941 (M.D. Tenn. 1968). Neither the District Court nor the Court of Appeals ever made any finding of fact which conflicts with these findings.

As set forth and discussed more fully in the Petition for the Writ of Certiorari filed with this Court on behalf of these parties, the remedy imposed against them by the District Court and affirmed by the Court of Appeals was premised solely upon the fact that the student body of TSU has a disproportionately large number of black students. Accordingly, the decisions of the lower Courts failed to heed the teachings of *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977) and other decisions of this Court which have firmly established that the racially disproportionate impact of a particular course of conduct may not properly be equated with a discriminatory purpose. (This analysis of the lower courts' rationale assumes *arguendo* the validity of the somewhat dubious proposition that the exercise by black students of their right to attend TSU may realistically be thought of as an "impact" upon them resulting from someone else's conduct).

Even if, contrary to this Court's repeated pronouncements on this point, a discriminatory purpose could properly be inferred solely from the existence of a racial imbalance at particular schools, such inference would be inappropriate in the context of higher education. Inasmuch as it is undisputed that students in Tennessee exercise a free and unfettered choice with respect to the institutions which they will attend and, further, educational

officials have affirmatively encouraged black students to attend predominantly white institutions, which encouragement is in part responsible for the state-wide progress in integration of institutions of higher education which the District Court found to satisfy Constitutional requirements, the only rational inference to be drawn from this situation is that the continued, though steadily decreasing black predominance at TSU is a result of the exercise of free choice by students. Clearly the existence of such a situation is not a sufficient basis to invoke the remedial powers of the Federal Courts.

A further very important distinction between the *Dayton* and *Columbus* factual situations and that presently before the Court is that both of those decisions involved a single school system within which certain schools were found to be "black enclaves", whereas here the District Court's remedy was imposed against an institution which is part of an entirely separate school system from that within which the situation violative of the Constitution was found to exist, and the school system against which the remedy was imposed was not found to have been guilty of any discriminatory conduct. In fact, the District Court expressly found that the state-wide progress of racial integration within the University of Tennessee school system met Constitutional standards, and the racial balance of UTN itself roughly approximates the racial composition of the population which it serves. Accordingly, as set forth in the Petition, the Courts below, by having imposed a remedy against a separate school system which has not been found to be guilty of intentional discriminatory conduct violated the fundamental principle enunciated by this Court in *Milliken v. Bradley*, 433 U.S. 267 (1977) that an inter-system remedy should not be imposed unless an inter-system violation is found.

Thus, contrary to the contention advanced by the State Board of Regents, it is apparent that the *Dayton* and *Columbus* decisions do not "resolve" the issues presented by this case. In fact, these opinions and their reaffirmation by this Court of certain fundamental principles previously announced with respect to the duties and obligations of school officials in the elementary and secondary school context only serves to bring into sharp focus the necessity for this Court to provide guidance and standards relative to what is required of state officials in dealing with racial imbalance in institutions of higher education, a matter as to which this Court has never definitively spoken.

CONCLUSION

For the reasons set forth herein and in the Petition heretofore filed with this Court on behalf of these parties, it is respectfully submitted that the petition for the Writ of Certiorari should be granted and this case should be reviewed by this Court.

Respectfully submitted,

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79-10

No. A-1026

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Respondents

On Application for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF UNIVERSITY OF TENNESSEE

* * * * *

Motion of University of Tennessee at Nashville Chapter of American Association of University Professors (UT-N AAUP)

* * * * *

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Motion for Leave to File Brief Amicus Curiae

The University of Tennessee at Nashville Chapter of the American Association of University Professors (UT-N AAUP) respectfully moves this court for leave to file a brief in this case as amicus curiae. Attorneys for petitioners University of Tennessee and the Tennessee Higher Education Commission have given consent, as has the Solicitor General and Plaintiff-Intervenors Richardson et al. The other parties have withheld consent.

Interest of Amicus Curiae

The UT-Nashville Chapter of the American Association of University Professors (AAUP) is the local affiliate of the national AAUP and seeks to advance the standards, ideals and welfare of UT-Nashville faculty, consistent with national AAUP standards of institutional practice. These national standards, formulated as Statements, are considered normative in American higher education. This Court has, in the past, acknowledged AAUP standards in determining the reach of the

Constitution on campus. Board of Regents v. Roth, 408 U.S. 564 n. 17 (1972).

Two of the AAUP's more important Statements are Statement on Government of Colleges and Universities and The 1940 Statement on Academic Freedom and Tenure. The former, Statement on Government, assigns to the institution's faculty a major role in setting educational policy. The second defines the rights and duties of responsible faculties in carrying out educational policies and institutional goals. Taken together, these documents comprise an "educational Magna Carta" which help preserve individual rights and maintain educational equilibrium in times of stress and conflict. This is true whether the crisis of the moment is a Red scare, student unrest or a drastic change in institutional organization.

The instant case concerns the constitutional power of a federal court to order a desegregated but predominantly white college merged into a predominantly Black college. Thus the decision affects the faculty's ability to influence institutional policy and programs; and it sharply curtails the affected faculty

members' personal contractual and constitutional rights. Hence this is an appropriate case to call upon the AAUP Statements for guidance.

Equally important, the UT-N AAUP Chapter is an instrument for promoting desegregation, and its members, as officers of an educational institution have an independent duty to apprise this Court of the educational merit of the relief ordered herein. Amicus will alert this Court that the present posture of this case is likely to frustrate the goal of desegregation because the decisions below lack standards by which to measure successful desegregation and the decisions lack standards which insure viable educational programs. According, amicus will address educational grounds why this Court should grant the writ of certiorari.

The UT-N AAUP Chapter respectfully requests this Court to grant it permission to file its brief amicus curiae in this case.

Respectfully submitted,

Lewis L. Laska, J.D., Ph.D.
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CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served and that I have mailed copies of the foregoing document to the attorneys below this 13th day of ~~June~~ August, 1979.

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MOTION FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

79-10

No. A-1026

THE UNIVERSITY OF TENNESSEE, et al.
Petitioners

v.

RITA SANDERS GEIER, et al.
Respondents

On Application for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE

University of Tennessee at Nashville
Chapter of American Association
of University Professors (UT-N AAUP)

* * * * *

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BRIEF OF THE UT-N CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

AMICUS CURIAE

The University of Tennessee at Nashville Chapter of the American Association of University Professors appears amicus curiae upon motion to this Court.

Interest of Amicus Curiae

The interest of the UT-N Chapter of the American Association of University Professors (AAUP) as amicus curiae is set forth in the Chapter's motion for leave to file this brief amicus, to which motion this brief is annexed.

Summary of Argument

On January 31, 1977, the day the University of Tennessee at Nashville UT-N) was ordered merged with Tennessee State University (TSU) by the District Court, there existed in this country ten other cities like Nashville where similar Black/white public colleges were operated. These schools employed over nine thousand

faculty[1]. The decision here, especially the process by which merger was ordered and carried out, demands careful scrutiny because merger is likely to be used to achieve desegregation at these other schools. Accordingly, the UT-N AAUP Chapter will argue that this Court should consider educational assumptions as well as constitutional issues in deciding whether to grant the writ of certiorari in this case. These issues include:

1. Whether the decision to merge or the merger plan sets standards by which to monitor the success or failure of the merger remedy.
2. Whether there was appropriate faculty participation in the decision to merge.
3. Whether the merger plan provides adequate safeguards for affected faculty.

---

[1] These schools enrolled over 170,000 students. See Appendix A for a comparative list of these schools. Besides colleges which exist in a side-by-side situation, there is a total of more than 100 racially-identifiable colleges which will be affected by the disposition of this case.

Amicus will ask this Court to view the foregoing issues in light of the AAUP's Statements regarding faculty rights and the faculty's role in the desegregation process. Amicus concludes that this Court's sensitivity to educational issues impels granting the writ of certiorari in this case.

ARGUMENT

I. This Court should review this case and set standards by which faculty can monitor the success or failure of its efforts to desegregate Tennessee State University.

On the date UT-N was ordered merged with TSU, UTN's enrollment was 14.5% Black. Amicus contends this was adequate to meet the college's affirmative duty to desegregate because UT-N as a night school draws only commuting students most of whom are daytime employees or homemakers. These come from the Greater Nashville Metropolitan SMSA which is 16% Black.[1] The District Court disregarded this test of desegregation and applied

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[1] In 1975, the population of Tennessee was 15.6 percent Black. The Nashville-Davidson County percentage was 19.6;

an interactive theory of state action in which the state as a whole was seen as the responsible party. It concluded that the existence of UT-N was a constitutional violation because it fostered "competition" for students, limiting TSU's ability to desegregate.[2]

Regardless of how this Court treats the interactive theory, amicus urges this Court to establish standards which define a unitary system of higher education. With or without a merger, the faculty at UT-N will still have an affirmative duty to desegregate itself and/or successor institutions--but what is the measure of the duty? This Court has recently acknowledged the faculty's role in using

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but the revised 1975 Nashville SMSA (8 counties, including Davidson), based on 1970 population data was 16.3 percent. U.S. Bureau of the Census, Statistical Abstract of the United States,1978 (99th ed.) Washington, D.C, 1978, pp.25,33; 1970 Census of Population, pt.44 Tennessee, vol.1 Population, (Washington,1973) pp.101-104. The June,1979 graduating class was 26% Black.

2 Geier v. Blanton, 427 F. Supp. 660,661 (M.D.Tenn.1977).

race as a criteria in admitting applicants to professional schools. See, Regents of the University of California v. Bakke, ___U.S.___, 98 S.Ct. 2733, 57 L Ed 750 (June 28, 1978). Now this Court should specify what race percentage of undergraduate students (and faculty) at a given school or geographical area achieves racial equilibrium: that is, to identify at what point race is no longer an acceptable criterion upon which to deal with students and faculty. Absent such standards the affected faculty must continually grope for an undefined "unitary" system, never certain of their role in Black colleges.[3]

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3 Black administrators appear uncertain about what standards identify a unitary system. The Black president of TSU was asked to identify "effective desegregation" of Nashville higher education. His response:

A: Effective desegregation of this area to me does not mean UT-N going to eighty-twenty and TSU going to sixty-forty. The effective desegregation of the Nashville area means a single institution serving the population of this area.

Q: It doesn't just mean a single institution, it means TSU serving only this area?

The lack of identifiable standards is an acute problem in this case because the (unknown) standards applied to the Nashville situation differed radically from the (again unknown) standards applied statewide. In a companion appeal the Sixth Circuit Court of Appeals held that statewide desegregation was proceeding properly although only one other college had achieved UT-N's percentage of Blacks.[4] The paradox resulting from conflicting decisions of the Sixth Circuit seriously destabilizes important nationwide desegregation strategy announced in Adams v. Richardson, 480 F.2d 1159 (D.C. Cir 1973):

A: That's right.
Q: And it means TSU serving it with assurances of Black leadership, does it not?
A: In the short term, yes.

Testimony of Dr. Frederick S. Humphries in Geier v. University of Tennessee, Joint Appendix, Vol. VI, pp. 1415-1416.

[4] Richardson v. Blanton, case nos. 77-1622 and 77-1624, Sixth Circuit Ct. of Appeals, April 13, 1979. "It was felt that statewide desegregation would be achieved if each institution enrolled Black students in approximate proportion to the Black population of its service area." (slip. opinion, p.6)

"The problem of integrating higher education must be dealt with on a statewide rather than a school-by-school basis." (p. 1164).

The nationwide desegregation case, Adams v. Richardson, supra, expressly relied on the experience in the instant case in fashioning state-wide rather than school-by-school remedies. See, HEW, Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education in Haynes, A Critical Examination of the Adams Case: A Source Book (Washington: Institute for Services to Education, 1978), at p. k-7 to k-8. Moreover, the presidents of the affected Black colleges, in an amicus brief in Adams argued against the merger remedy ordered herein. They argued vehemently on educational grounds against the view that

> "... the maintenance of the Black Colleges and the larger University within a particular state is the maintenance of a dual system of education based upon race and therefore the state is discriminatory and engaging in conduct forbidden by the Fourteenth Amendment. It follows then, that the state must establish a unitary system--one system. To accomplish this,

> the Black institutions must be assimilated into the white unitary system where there is presumptively equal educational opportunity, independent of, and maybe contrary to, the state's wishes to establish and maintain a "special purpose" institution of Higher Education."[5]

Amicus in Adams, like amicus here, insists that the state has a legitimate interest in maintaining properly desegregated "special purpose" colleges. The University of Tennessee at Nashville, a night school, meets this definition. Amicus here also agrees with amicus in Adams that the free-choice nature of higher education requires different desegregation approaches and that Brown's progeny cannot be ipso facto applied to every level of education.[6] This Court is

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[5] Amicus brief of National Association for Equal Opportunity in Higher Education (Adams v. Richardson) in Haynes, A Critical Examination of the Adams Case: A Source Book (Washington: Institute for Services to Education, 1978) p. c-22 to c-23.

[6] Id. at p. c-21 to c-23.

in apparent agreement. Cf. Alabama State Teachers Association (ASTA) v. Alabama Public School and College Authority, 289 F. Supp. 784 (M.D. Ala. 1968), affd. per curiam 393 U.S. 400 (1969). And the District Court in the instant case took this position in 1972, only to abandon it in 1977. Geier v. Dunn, 337 F. Supp. 572, 579 (M.D. Tenn. 1972).

The lack of comprehensible institutional or statewide standards seriously impedes educational as well as desegregation planning. In the instant case UT-N faculty had asked the District Court to adopt a consolidation-type merger rather than an absorption. To amicus, consolidation seems the best way for UT-N to "support" TSU, a school which both plaintiffs[7] and the District Court characterized as a weak or deteriorating[8]

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[7] "The quality of instruction [at TSU] is basically substandard." Plaintiff's memorandum of criteria concerning Proposal for Disestablishment of Dual System of Higher Education in Tennessee. April 4, 1969 at p. 6.

[8] Sanders v. Ellington, 228 F. Supp. 937, 943 (M.D. Tenn. 1968).

institution. Now, without court-defined desegregation standards and court-imposed assurance that steps will be taken to enhance the "merged TSU," there is grave danger that the school will re-segregate and decline even more. Amicus asks this Court, in addition to considering desegregation standards, to consider steps to enhance academic programs akin to those ordered in Hunnicutt v. Burge, 356 F. Supp. 1227 (M.D. Ga. 1973). Cf. Milliken v. Bradley, 433 U.S. 267 (1977). Amicus earnestly asks this Court to grant the writ of certiorari and review this question, regardless of this Court's decision on the appropriateness of the merger remedy ordered herein.

As educators, we look with dismay at the legal conclusions drawn from faulty educational assumptions. To illustrate, the District Court cited the "successful" transfer of UT-N's graduate teacher education program to TSU as a predicate for full merger. Geier v. Blanton, 427 F. Supp. 644, 655, 656, (M.D. Tenn. 1977). In truth, the transfer was a dismal failure--only ten percent of the UT-N students attended TSU and only one of six

affected faculty members became employed there. See Smith, An Analysis of Enrollment Decisions Following Court Ordered Program Termination and Transfer (Ed.D. dissertation, University of Tennessee at Knoxville, June 1976).

Amicus earnestly calls upon this Court to weigh carefully the educational considerations as well as purely legal ones involved herein. To Amicus, as educators, mere desegregation is not enough. Our goal is equality of educational attainment: in short, effective desegregation.

Finally, the Black colleges[9] themselves

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[9] As used here "Black colleges" means public institutions. Generalizations about the nature and role of Black colleges ignore a wide diversity among such schools. For analysis of these differences, see Jencks and Riesman, The American Negro College, 37 Harvard Educational Review 3-60 (1967); Bowles and DeCosta, Between Two Worlds, A Profile of Negro Higher Education (New York: Carnegie Comm'n on Higher Education, 1971). According to this source (p.286) there are 34 public Black four-year colleges in the United States.

deserve to know what the Constitution requires of them. These schools' friends usually argue for enhancement without eliminating the Black predominance[10] while other voices (friendly or not) cite the schools' serious educational[11] and administrative[12] weaknesses and argue for closer cooperation with white institutions and

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10 The classic argument is made by Tollett, Black Institutions of Higher Learning: Inadvertent Victims or Necessary Sacrifices? 3 Black Law Journal 162-174 (1973). See also, Note, The Affirmative Duty to Desegregate State Systems of Higher Education Without Eliminating Racially Identifiable Schools, 5 North Carolina Central Law Review 365 (1974). Black colleges are not without Black critics. See Sowell, Black Education, Myths and Tragedies (New York: McKay, 1972), p. 251-265.

11 Golsan, Wasting Black Minds, 40 Progressive 29 (September 1976). Stringer, White Teacher, Black Campus, Change (November, 1974) 27. (Accounts of white teachers' frustrations in teaching at Black colleges).

12 Johnson, The Black College as a System, Daedalus (Summer, 1971) 798-812 (paternalistic administration). See also, Jones, Uncle Tom's Campus (New York: Praeger, 1973).

faculty[13]. Regardless of what remedy this Court orders, all knowledgeable observers agree that the time is ripe for decision. Kenneth Tollett, a leading Black educator writes, "Not since Sweatt has the Court spoken directly and explicitly to the status of predominantly Black public higher education institutions."[14] And Tollett has expressed concern that the Green doctrine might lead to the consolidation or merger and, thus, destruction of Black institutions.[15]

II. This Court should accept this case for review to consider whether there was appropriate UT-N faculty participation in the decision to merge UT-N with TSU.

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13 See Pettigre, The Role of Whites in the Black Colleges of the Future, 100 Daedalus 814 (Summer, 1971); Monroe, The Black College Dilemma 53 Educational Record 136 (Spring, 1972).

14 Tollett, supra note 10

15 Tollett, supra note 10. Administrators of Black colleges echo these fears. See, King V. Cheek, Jr. (President, Morgan State College) "The Philosophical Justification for Black Colleges in a Multiracial Society," Address, Concurrent General Session, 27th Annual Conference on Higher Education, American Ass'n for Higher Education, Chicago, March 6, 1972. ERIC Doc. ED 061 871.

The District Court ordered the defendants to draw up a plan merging UT-N and TSU. This Merger Plan was, in effect, approved by the District Court in 1977 when it refused to stay or hear objections to it. The Plan was confected by a six-person Committee of administrators which did not include participation by any UT-N faculty members except as observers. Earlier, no UT-N faculty members were called to the witness stand by any party during the month-long trial of this case.

The failure to allow faculty any input regarding the decision to merge or substantive input into the process of merger planning violates the letter and spirit of the AAUP's Statement on Government of Colleges and Universities which warns, "unilateral effort can lead to confusion or conflict" and states: "...major changes in ... the relative emphasis to be given to the various elements of the educational and research program should involve participation of governing board, administration, and faculty prior to final decision."[16] (Emphasis added).

[16] AAUP Policy Documents and Reports ("Redbook") 1977 Edition (Washington: AAUP, 1978), p.40.

In the present case the excluded faculty were predominantly white, but if the merger is allowed to stand it will set a precedent which will in most instances have the opposite result--Black colleges will be absorbed by white colleges.[17] A decent respect for the interests of all faculty members requires letting their voices be heard and this Supreme Court should consider the educational and personal concerns of the affected faculty as well as merely their race or the race of the students they serve.

Amicus is not asking this Court to grant certiorari simply to review evidence and discuss specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925). Rather, amicus wants to bear witness that desegregation remedies have sometimes borne untoward results because they cut across the fabric of academic

[17] In the instant case the Black president of TSU favored a merger of UT-N under TSU control, but expressed concern that a series of junior college mergers in Florida had resulted in the Black colleges merged into the white ones. Testimony of Frederick S. Humphries in Geier v. University of Tennessee, Joint Appendix, Vol. V, pp. 1340-1342.

life. For example, in lower education one result has been large-scale teacher displacement, especially Black teachers, an unacceptable fallout. See, Jefferson, School Desegregation and the Black Teacher: A Search for Effective Remedies, 49 Tulane Law Review 55 (1973).

III. This Court should review the remedy (a plan merging a white and Black college) to consider whether it provides adequate safeguards to protect the affected faculty and their ability to effectively desegregate and enhance the merged TSU.

The failure to allow UT-N faculty substantial input into formulating the Merger Plan resulted in serious erosion of faculty contractual rights. For example, each UT-N teacher will be required to teach 15 semester hours (5 courses per semester) rather than the present 12 hours. This exceeds the maximum teaching load of 12 hours endorsed by the AAUP's Statement on Faculty Workload (1970).

The foregoing is but one objection the UT-N AAUP Chapter has regarding the Merger Plan.[18] Because the desegregating of Ten-

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[18] Numerous objections to the Merger Plan were brought before the State Board of Regents (TSU governing body) but were disregarded; the Board approved a new faculty handbook which was unacceptable to UT-N faculty.

nessee State University is a process,[19] amicus argues that this Court, in assessing the goal to be achieved should consider the effect of process on the rights of all parties--here the faculty. Long before Brown, this Court was sensitive to process as well as result in higher education cases; ruling that the mere admission of Blacks to a college did not achieve proper desegregation if the school erected barriers which thwarted a sound educational experience. See, McLaurin v. Oklahoma State Regents, 330 U.S. 637 (1950).

In the instant case, it is difficult for amicus, as educators, to understand how the goal of providing a sound educational experience to disadvantaged students is promoted by increasing the faculty's teaching load. Logic dictates

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[19] Until the decision in the instant case, college desegregation was viewed as a process not a result. See, Note, The Affirmative Duty to Integrate Higher Education, 79 Yale Law Journal 666 (1970).

decreasing the teaching load to allow time for intensive advising and remedial work.

In the instant case the UT-N faculty offered its own merger plan months before the final one was filed with the court, yet the merger planners summarily dismissed it even though the court ordered them to hear faculty concerns and instructed that the plan not violate any faculty member's rights.[20] Further, despite repeated requests by UT-N faculty for definite objective standards[21] in the

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[20] See, Brief of Appellants Peter Jordan, et al., Plaintiff, Intervenors. Case no. 77-1620, Geier v. University of Tennessee, U.S. Ct. of Appeals, Sixth Circuit, p. 7; certiorari denied. Peter Jordan, et al v. University of Tennessee, et al. Case no. 78-1162, April 2, 1979.

[21] Affected faculty must be appointed and assigned to consolidated schools according to "definite objective standards" of employment. Rolfe v. County Board of Education, 391 F. 2d 77 (6th Cir. 1968).

in the Merger Plan for the appointment and assignment of faculty and administrators, no such standards were adopted, and progress of the merger to date indicates an intention by TSU and Board of Regents officials to maintain TSU academic operations as they are, not to enhance them.

In short, the Merger Plan--a court ordered and approved document--has seriously imperiled the academic freedom of the UT-N faculty. Yet this Plan is the device whereby the District Court wants the State of Tennessee "to convert its white colleges and Black colleges to just colleges."[22] Amicus insists that a justly treated faculty is a necessary predicate to a "just" college and calls upon this Court to review this case in order to ascertain whether the remedy here promotes academic freedom in achieving a constitutional end.

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[22] Norris v. State Council of Higher Education for Virginia 327 F. Supp. 1368 (E.D. Va. 1971), aff'd. per curiam sub nom. Board of Visitors of the College of William and Mary v. Norris, 404 U.S. 907 (1971)

CONCLUSION

The salient issue in the instant case is whether a federal court can order a white and Black college merged in order to desegregate the latter. The UT-N AAUP Chapter has shown that resolution of this issue will have immediate and direct effect on nearly two dozen colleges and will influence the fate of the nation's over one hundred racially identifiable colleges. Amicus has argued that the merger remedy violates AAUP standards relating to faculty rights and institutional decision making. Amicus has shown that the remedy--whether affirmed by this Court or not--is defective because it lacks standards against which to measure successful desegregation.

It follows that this Court has before it a case of national importance touching vital issues of desegregation and academic freedom. Amicus respectfully asks this Court to grant the petition for certiorari sought by petitioner University of Tennessee and enter this case on its docket for plenary review.

Respectfully submitted,

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Attorney for Amicus Curiae

APPENDIX A

Comparative list of Public Black and white colleges in the same Metropolitan area.

	Students	Faculty
Alabama A&M U.	4500	230
U.of Alabama, Huntsville	3800	175
Alabama State U.	4150	240
Auburn U., Montgomery	3800	150
Florida A&M U.	5900	360
Florida State U.	21600	1250
Albany State College	2200	130
Albany Junior College	2000	70
Savannah State College	2500	135
Armstrong State College	3200	150
Southern U.	9000	475
Louisiana State U.	25000	1200
Jackson State U.	7900	380
Hinds Junior College	6800	290
North Carolina A&T U.	5500	350
U.of N.C., Greensboro	9900	550
Texas Southern U.	9100	390
U. of Houston	29800	1400
Norfolk State College	6800	390
Old Dominion U.	13200	660
	176850	9125

Source: Yearbook of Higher Education, 10th ed. (Chicago: Marquis, 1978), HEW, National Center for Education Statistics, Education Directory: Colleges and Universities, 1977-78 (Washington: GPO, 1978).

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served and that I have mailed copies of the foregoing document to the attorneys below this 13th day of ~~June~~ August, 1979.

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REPLY OF ORIGINAL PLAINTIFFS, RITA SANDERS GEIER, PATRICK J. GILPIN, ERNEST TERRELL, HAROLD SWEATT, and PHILLIP SWEATT TO BRIEF *AMICUS CURIAE*

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Petitioner,

v.

RITA SANDERS GEIER, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY OF ORIGINAL PLAINTIFFS, RITA SANDERS GEIER, PATRICK J. GILPIN, ERNEST TERRELL, HAROLD SWEATT, and PHILLIP SWEATT TO BRIEF *AMICUS CURIAE*

The original Plaintiffs, Rita Sanders Geier, et al., objects to the motion of the University of Tennessee at

Nashville Chapter of the American Association of University Professors [hereinafter cited as UT-N AAUP] for leave to file a brief *amicus curiae,* which was served on August 15, 1979, on the following grounds:

A. This Court's judgment on the proposed merger will not affect UT-N AAUP's interest.

UT-N AAUP has absolutely no role in the desegregation of University of Tennessee at Nashville [hereinafter cited as UT-N] and therefore any judgment by this Court will not affect UT-N AAUP. *See* Petitioner's Motion for Leave to File Brief *Amicus Curiae* on Behalf of University of Tennessee at 2, *University of Tennessee v. Geier,* No. 79-10 (U.S., filed July 3, 1979) [hereinafter cited as *Geier*]. The merger was devised to remedy *de jure* segregation practiced by the State of Tennessee, not educational methods used by professors in its employ. As such, the Court must require the State of Tennessee—not UT-N teachers—to implement the merger.

B. The adjustment of UT-N AAUP members to employment in an integrated university affects neither their contractual nor their constitutional rights.

The merger of UT-N and TSU will not curtail "the affected faculty members' personal contractual and constitutional rights." Petitioner's Motion for Leave to File Brief *Amicus Curiae* on Behalf of University of Tennessee at 2-3, *Geier.* Although proposed *amicus* contends that, absent Supreme Court standards defining a unitary system of higher education, "affected faculty [will] never [be] certain of their role in Black colleges" (Petitioner's Brief *Amicus Curiae* at 5, *Geier*), "a role in Black colleges" does not violate any contractual right, nor due process or equal protections rights.

C. UT-N AAUP's request for amicus curiae status is estopped by laches due to its failure to participate in any proceeding of the lower courts.

Petitioner did not participate in the proceedings of any of the three United States District Court trials (*Sanders v. Ellington,* 288 F.Supp. 937 (M.D. Tenn. 1972); *Geier v. Dunn,* 337 F.Supp. 573 (M.D. Tenn. 1972); *Geier v. Blanton,* 427 F.Supp. 644 (M.D. Tenn. 1977)) nor the proceedings of the United States Court of Appeals for the Sixth Circuit, *Geier v. University of Tennessee,* 597 F.2d 1056 (6th Cir. 1979). Thus, although proposed *amicus* contends that it has a role in the desegregation process of Tennessee's public higher education system, *supra,* the complete diffidence of proposed *amicus* for twelve years of litigation mandates the estoppel by laches of any claims by proposed *amicus* of an interest in this proceeding.

D. The lack of specificity in any of UT-N AAUP's claims is fatal to its request for permission to file a brief *amicus curiae*.

Arguments by proposed *amicus* that this case weighs heavily on issues of, e.g., academic freedom, measurements of desegregation, and "just" colleges are too vague for human comprehension. *Amicus* couches its arguments in terms that not only lack legal significance but legal meaning. Further confusion is engendered by Petitioner UT-N AAUP's retained counsel's representation. From a letter of Mr. Laska:

> "My earlier request [to file an *amicus* brief] was made on behalf of the UT-N faculty, but certain objections have been raised, namely that I did not actually represent the faculty. Be that as it may, this request is made on behalf of the UT-N Chapter of the American Association of University Professors."

E. All facts and questions relative to the issues involved in this action have been adequately presented to the Court by the parties.

CONCLUSION

For the foregoing reasons we respectfully submit that the motion of UT-N AAUP for leave to file a brief *amicus curiae* should be denied.

Respectfully submitted,

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